IN THE

# Supreme Court of the United States

October Term, 1948
No. 279

STANDARD OIL COMPANY OF CALIFORNIA and STANDARD STATIONS, INC.,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

**Appeal From the District Court of the United States for the Southern District of California.**

## BRIEF OF APPELLANTS, STANDARD OIL COMPANY OF CALIFORNIA AND STANDARD STATIONS, INC.

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This is a direct appeal from a judgment of the District Court of the United States for the Southern District of California by Standard Oil Company of California and Standard Stations, Inc. They were defendants below.[1] They present the following brief to support their contention that such judgment should be reversed.

## OPINION BELOW.

The opinion of the District Court [R. 99-140] is reported in 78 F. Supp. 850, and the supplemental opinion [R. 158-167] of the District Court is reported in 78 F. Supp. 875.

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[1]Herein appellee will sometimes be referred to as "plaintiff" and appellants as "defendants." References to pages of the record are designated: R. A page reference to an exhibit is followed by a reference to the page at which such exhibit was admitted in evidence. Italics throughout this brief have been supplied.

## JURISDICTION.

The final judgment of the District Court against appellants was entered on June 30, 1948 [R. 188, 194]. Petition for appeal [R. 1866] was filed and allowed [R. 1876] on July 20, 1948. The jurisdiction of this Court is conferred by sec. 2 of the Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272, 15 U. S. C. 29),[2] and sec. 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938, 28 U. S. C. 345). Probable jurisdiction was noted on October 19, 1948 [R. 1947].

## STATUTES INVOLVED.

The pertinent provisions of secs. 1 and 4 of the Act of July 2, 1890, as amended, commonly known as the Sherman Act, are as follows:

> Sec. 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . ." (26 Stat. 209; 15 U. S. C. 1.)

> Sec. 4. "~~The several district courts of the United~~ States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United

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[2]Effective September 1, 1948, subsequent to the allowance of the appeal herein, Sec. 2 of the Act of February 11, 1903 (15 U. S. C. 29) was amended by the new United States Code—Judiciary and Judicial Procedure, but such amendment established no change in the jurisdiction theretofore conferred by the Act of February 11, 1903. The new amendment, being Sec. 17 of an Act entitled "An act to revise, codify, and enact into law title 28 of the United States Code entitled 'Judicial Code and Judiciary,'" reads: "In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. . . ." (26 Stat. 209; 15 U. S. C. 4.)

Secs. 3 and 15 of the Act of October 15, 1914, as amended, commonly known as the Clayton Act, are as follows:

Sec. 3. "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." (38 Stat. 731; 15 U. S. C. 14.)

Sec. 15. "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. . . ." (38 Stat. 736; 15 U. S. C. 25.)

## STATEMENT.

**History of the Litigation.**

The United States, on January 2, 1947, brought this suit under sec. 4 of the Sherman Act and sec. 15 of the Clayton Act to enjoin alleged violations of sec. 1 of the Sherman Act and sec. 3 of the Clayton Act [R. 1-12]. The complaint charged that Standard Oil Company of California (herein called "Standard"), and its wholly owned subsidiary, Standard Stations, Inc.,[3] had made certain written "exclusive supply" agreements and subleases (herein called "requirements" contracts) with numerous independent service station operators and garage operators in the Western area [R. 7].[4] These "requirements" contracts obligated Standard to sell to the dealer and the dealer to buy from Standard his requirements of petroleum products used or sold or bought to be used or sold by the dealer at a designated service station or garage, and certain but not all of these "requirements" contracts extended these obligations to tires, tubes and batteries [R. 7, 8, 171-178]. The complaint also charged that the companies entered into oral agreements with like obligations with certain service station and garage operators [R. 7].

The making of written "requirements" contracts was not denied. The existence of oral agreements was denied [R. 94].

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[3]Defendant, Standard Stations, Inc., since June 1, 1944, has confined its activities to the management and operation of Standard's company-operated service stations, known as "Standard Stations." [R. 1064.] These stations are not involved in this suit.

[4]Defined, in the complaint as the states of California, Oregon, Washington, Arizona, Nevada, Idaho, Utah and New Mexico. [R. 3.] It subsequently appeared that neither of the defendant companies made contracts or subleases with any one in New Mexico or marketed their products in that state. Therefore it was conceded during the trial that the "Western area" did not include New Mexico. [R. 201.]

The complaint charged that these contracts covering these products had the effect of eliminating competition between Standard and other producers and manufacturers of products of like utility and quality for the patronage of a substantial portion of the retail outlets for such products in the Western area, and deprived a substantial portion of such retail outlets of the opportunity of purchasing such products from producers and manufacturers of their own selection and at prices determined in free and open competition, and secured to Standard a monopoly of the patronage for such products in a substantial portion of such retail outlets, thereby "restraining and substantially lessening competition in the interstate trade and commerce in petroleum products and automotive accessories" [R. 10].

These allegations were denied by the answer [R. 95], and issue was joined upon plaintiff's contention that the "requirements" contracts unreasonably restrained and substantially lessened competition in interstate commerce [R. 88-95].

Issue was likewise joined upon defendants' affirmative defenses that the "requirements" contracts had long been employed by Standard's competitors; that the practice had arisen and been pursued because dealers required over a definite period a supply of these products to satisfy their requirements; that the "requirements" contracts were the outgrowth of competition; that Standard's competitors in the Western area were numerous and aggressive; and that but for the "requirements" contracts the competition of Standard for the trade of the dealers would have been eliminated [R. 95, 96].

No conspiracy or combination was charged.

No price fixing or price control or price discrimination, or attempt at anything of this sort, was charged.

No control over or interference with supply, or attempt at anything of this sort, was charged.

The cause was tried in the District Court during May, 1948.

On June 7, 1948 the District Court filed an opinion upholding the contentions of the government [R. 99-140]. Thereafter, before the making of findings or the entry of judgment, Standard moved the District Court to reopen the cause and hear further argument upon and reconsider its opinion in view of the decision of this Court on June 7, 1948 in *United States v. Columbia Steel Co.*, 334 U. S. 495 [R. 141-157]. Following argument, this motion for reconsideration was denied on June 28, 1948 [R. 168], and the District Court on that date filed a supplemental opinion [R. 158-167].

The District Court's findings of fact are set forth in 32 paragraphs [R. 168-185], and its conclusions of law in 10 paragraphs [R. 186, 187]. Error has been assigned to many of the District Court's conclusions, and to certain of its findings [R. 1867-1875]. While appellants have not challenged many of the District Court's findings as to specific facts, they believe that the significance of many of these can be determined only if weighed in relation to other undisputed facts which the findings and the District Court ignored. Error has been assigned to the failure to find the facts thus ignored [R. 1870-1872]. Error has also been assigned to the District Court's exclusion of certain evidence [R. 1872-1875].

In this statement of the case we invite attention to the following facts, some of which appear from the findings and all of which are established by uncontradicted evidence.

**Standard's Refining and Distribution Facilities.**

Standard, which is an integrated oil company engaged in production, transportation, refining and distribution [R. 169], has three refineries. All are located in California. One is on San Francisco Bay at Richmond; one is in the center of the state at Seguro near Bakersfield; and one is on the coast at El Segundo near Los Angeles [R. 182, 979, 1008, 975, 976].

The crude oil processed at these refineries comes solely from California oil wells [R. 223, 227].

Gasoline, lubricating oil and other products of the California refineries reach the service stations and other retail outlets either directly from the refinery by tank truck, where the truck haul is not too extended, or from bulk plants owned and operated by Standard [R. 182, 229, 230, 980-991, 1755, 1759, 975, 976], these bulk plants being supplied from the California refineries by ocean tanker, barge, railroad tank car, or tank truck [R. 182, 1755-1757, 975, 1759, 1760, 976].[5] At the service stations and other outlets these products are sold at retail to the motoring public.

Substantially all tires, tubes and batteries sold by Standard to retail dealer outlets in the Western area, are purchased by Standard at wholesale from factories and plants located in California [R. 230, 1051, 975, 976).

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[5]All of Standard's retail dealer outlets throughout the Western area receive their petroleum products in this way from Standard's California refineries except certain outlets in Utah and southeastern Idaho, which are supplied with gasoline obtained by Standard from a Salt Lake City refinery operated by Utah Oil Refining Company [R. 182, 992-994, 1755, 975], and outlets in the eastern part of Arizona, which are supplied with gasoline obtained by Standard from an El Paso refinery operated by Standard Oil Company of Texas. [R. 182, 995-996, 1755, 975]

The other automobile accessories[6] sold by Standard to the outlets are purchased by Standard from various sources both within and without the Western area [R. 1048-1049, 975, 976]. Bulk shipments of tires, tubes, batteries and other accessories are received at accessory warehouses maintained by Standard at Salt Lake City, Utah; Phoenix, Arizona; Portland, Oregon; Seattle and Spokane, Washington; and San Francisco, Los Angeles and Fresno, California [R. 183, 184]. At such warehouses these products are sorted and stored [R. 248, 249, 258, 1039, 1052]. Thereafter these products are shipped by common carrier from these warehouses to retail dealers to fill the dealers' orders [R. 183, 1052, 975, 976].

The tires and batteries and many of the other accessories bear the brand name "Atlas," and are purchased from Atlas Supply Company [R. 183]. Others bear other brand names [R. 1041, 1042, 975, 976, 1111].

**Standard's Retail Dealer Outlets and Its "Requirements" Contracts.**

Presently Standard is distributing petroleum products, tires, tubes, batteries and other automobile accessories through two distinct types of retail outlet.

Sales are made to the public at so-called "Standard Stations," operated by Standard's own employees [R. 1057]. Their uniform and distinctive color scheme is red, white and blue [R. 1057]. These sales are not involved in this suit [R. 7-10].[7]

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[6]Such articles as spark plugs, oil filters, fan belts, battery cables, fuses, windshield wipers and blades, tire repair and vulcanizing kits, anti-freeze preparations, tire chains, polishes, etc. [R. 1350-1360, 255, 282.]

[7]Sales of gasoline and other petroleum products are also made by Standard to industrial, commercial and agricultural accounts. [R. 1018, 975, 976.] These sales are not involved in this suit.

Sales are also made to independent dealers, most of whom are so-called "Chevron dealers."[8] These outlets are involved in this suit.

Although (as hereinafter noted) Standard has distributed generally through independent dealers since 1938, the dealers were not called "Chevron dealers" until 1945 [R. 1059].

Under this "Chevron dealer" system Standard paints the dealers' stations, following a distinctive and uniform pattern employing the colors cream, green and burgundy [R. 1059]. The dealer's name is featured prominently on the station [R. 1061]. In order to meet competition Standard in many cases installs certain equipment for these dealers, such as pumps, tanks, air compressors, air and water wells, hoists, buildings, canopies, rest rooms, lubricating oil equipment, drinking fountains, special lighting, paving and signs [R. 1084, 1085]. These dealers receive a special monetary allowance from Standard in consideration of their maintaining clean rest rooms [R. 1085, 1086].

To improve the service which these dealers offer the motoring public, Standard furnishes them the aid of a company employee, called a "dealer merchandiser," who trains the dealer. [R. 1103.]

Standard also furnishes these dealers with elaborate manuals of information and instruction prepared by the Company's organization, dealing with car lubrication for different makes and models of cars [R. 1086, 1087, 1099, 1822, 1100], the installation and repair of tires, tubes, batteries and other accessories [R. 1100, 1824, 1101], as well as selling methods, advertising, and the most efficient

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[8]Taking the name "Chevron" from Standard's trade-mark depicting a chevron. [R. 1779-1781, 1065.]

utilization of the service the Company offers the motoring public. [R. 1101, 1827, 1101.] Standard also furnishes these dealers with bookeeping forms for the dealer's personal business accounting, periodical bulletins dealing with matters of current concern to the dealer's business, and numerous sales and advertising aids.[9] [R. 1102, 1103, 1104, 1848, 1102, 1858, 1104.]

On March 12, 1947 Standard was the owner or lessee and operator of 1063 company-operated Standard Stations in the Western area. [R. 1316, 212.]

On the same date Standard was also selling products to 5939 independent retail dealers. [R. 1315, 1316; 212.] With 742 of these Standard had no written agreement or lease of any kind and Standard did not own and was not the lessee of the property.[10] [R. 1316, 212.] In the case of the remaining 5197 dealers Standard had some form of contract or sublease with the dealer, and in 110 of such cases owned the property in fee, and in 3944 of such cases had leased the property from the owner thereof. [R. 1315, 212.][11] Not all of these 5197 dealers handle

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[9]Such as direct mail "follow-up" and forms used in connection with the lubrication of customers' cars; also (at low cost to the dealer) other direct mail material for publicizing the station, billheads, stationery, envelopes and calling cards; also mats and cuts for newspaper and handbill advertising; also travel maps and information to enable customers to plan vacation trips. [R. 1104, 1105.]

[10]The District Court found [R. 179] that Standard had "oral agreements" with these 742 dealers "pursuant to which the dealer agreed to handle and sell only the gasoline acquired from or sold to him by defendant Standard." While appellant's contend that this finding is not supported by the evidence, this contention will not be argued upon this appeal since it is believed that the existence or non-existence of such "oral agreements" can have no bearing upon the result.

[11]Standard's capital investment in the land and equipment of *dealer* stations is approximately $16,500,000. [R. 1079, 1080.]

petroleum products, tires, tubes, batteries and automobile accessories purchased from Standard. For example, some handle Standard's gasoline only [R. 1074-1076], or Standard's lubricating oil only [R. 1074-1076], or Standard's petroleum products, but not tires, tubes, batteries or accessories sold by Standard. [R. 1074-1076; 1313, 212.]

Standard has not made contracts with dealers so as to have a concentration of dealers in any one locality in the Western area. [R. 1076, 1077.] Standard's 5197 dealer outlets under written contract are scattered throughout the area, which in its entirety embraces approximately 717,647 square miles. Illustrative of this absence of concentration are the Los Angeles basin and San Francisco bay areas—by far the most populous localities in the entire Western area.[12] In 1946 in the Los Angeles basin area there were 26 service stations for every dealer station handling Standard's gasoline [R. 1649, 910], and in the San Francisco bay area there were 13 service stations for every dealer station handling Standard's gasoline. [R. 1652, 910.]

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[12]The Los Angeles basin area includes Los Angeles, Alhambra, Pasadena, Glendale, Monrovia, Van Nuys, San Fernando, Newhall, Whittier, El Segundo, and other suburban communities. [R. 893, 894, 1650, 904, 1651, 904.] The San Francisco bay area includes San Francisco, part of Oakland, Berkeley, Piedmont, Albany, El Cerrito, Richmond, Sausalito, San Rafael and all cities on the peninsula south of San Francisco to and including Palo Alto. [R. 904, 911.]

The Los Angeles basin area is the largest retail gasoline market in the world. [R. 902.] By the 1940 census its population exceeded the population of either Oregon or Washington and exceeded the combined populations of Arizona, Nevada, Utah and Idaho. In 1946 there were more registered automobiles in Los Angeles County than in the states of Washington, Oregon, Nevada and Arizona combined. [R. 902.]

Standard's dealers do not occupy a substantial portion of the *favorably situated* retail outlets.[13] While a few of the company-operated Standard stations are situated in localities where, because of municipal ordinances or regulations, it would be difficult for a competitor to obtain a new location, this is not true with respect to Standard's dealer stations. The latter are situated in localities where a competitor can obtain a comparable location. [R. 1081, 1082].

The contract with or sublease to the dealer contains the so-called "requirements" clause, which is attacked in this case. Involved in this attack are the Dealer Agreement [R. 1301, 211]; the Dealer Agreement TBA [R. 1308, 211]; the Petroleum Products and Equipment Agreement [R. 1305, 211]; and the Sublease [R. 1311, 211]. The government also attacks the Distributor Agreement [R. 1304A, 211], use of which preceded use of the Dealer

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[13] The complaint alleged that "since the number of service station sites which will return reasonable profits to their operators in any given area is limited, it is recognized that established operators of *favorably situated* service stations occupy positions of substantial impregnability against competitive invasion of their respective areas by other operators" [R. 4]; also that Standard's dealer outlets constitute a substantial portion of all of the "favorably situated" retail outlets in the Western area. [R. 6.]

No evidence whatever was offered by the government to prove these allegations.

At the trial the District Court directed discontinuance by defendants' counsel of inquiry along this line, in view of the government's failure to offer proof to support these allegations. During the introduction of evidence by defendants and with reference to an objection made by government counsel, the District Court said: "I think the inquiry should be discontinued here. I do not think it is material to the issues as they stand now. It may well be that Mr. Hall [defendants' counsel] prepared this testimony in view of some of the allegations of your complaint, such as, for instance, *that they monopolize corners*; but you have offered no testimony at all connected with geography, as well as to good corners or bad corners or anything else; so that that issue is not before the court." [R. 1082.]

Agreement TBA, and use of which has been discontinued since September 1944. [R. 171, 1314, 212.][14]

Typical of the so-called "requirements" clause attacked in this case, is the language of the Dealer Agreement providing that Standard "agrees to sell to" the dealer and the dealer "agrees to buy from" Standard "all of Dealer's requirements of petroleum products used or sold or bought to be used or sold by Dealer at" the dealer's specifically described retail outlet. [R. 1301, 211.] Substantially the same language appears in the Petroleum Products and Equipment Agreement [R. 1305, 211] and the Dealer Agreement TBA. [R. 1308, 211.] The latter contains the further provision that Standard "agrees to sell or consign to" the dealer and the dealer "agrees to purchase or receive from" Standard "and stock and offer for sale, all Dealer's requirements of tires, tubes, and batteries used or sold or bought to be used or sold by Dealer on said premises . . . . . Company will deliver to Dealer such other merchandise currently sold by Company that Dealer wishes to handle hereunder, in quantities necessary in opinion of Company to meet Dealer's requirements at said premises." [R. 1308, 211.][15]

The Dealer Agreement [R. 1302, 211], the Dealer Agreement TBA [R. 1310, 211], and the Distributor Agreement [R. 1304A, 211] are by their terms terminable by either party on 30 days notice at the end of the first

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[14] As Distributor Agreements expire they are being replaced by the Dealer Agreement TBA. Thus on Mar. 12, 1947, there were 556 Distributor Agreements outstanding in the Western area. At the time of the trial there were only 232. [R. 1314, 212.]

[15] The Distributor Agreement, now superseded, contained substantially the same "requirements" clause as the Dealer Agreement TBA, but with this additional sentence: "Distributor agrees not to store, handle, distribute, or sell any other brand or brands of petroleum products at or from the station." [R. 1304A, 211.]

6 months or at the end of any 6 months period thereafter.

On March 12, 1947 there were outstanding 1800 Subleases, 1656 Dealer Agreements, 2221 Dealer Agreements TBA, 912 Petroleum Products and Equipment Agreements, and 556 Distributor Agreements. [R. 1313, 1314, 212.] In many cases a single dealer executed two or more of these documents.

**Standard's Long-continued Use of "Requirements" Contracts.**

As early as 1931 Standard was distributing its petroleum products through agents under leases and agency agreements [R. 170, 171], such leases and agency agreements in numerous instances providing that the agent would handle only Standard's petroleum products. [R. 171.] Use of the Distributor Agreement (later superseded by the Dealer Agreement TBA) began about 1934 [R. 171, 286, 1070], but the agency method of distribution was not superseded until 1938. [R. 171.]

In 1938 Dealer Agreements containing the "requirements" clause came into use, and a dealer system superseded an agency system. [R. 171, 286, 1070.][16]

In 1944 and thereafter the Dealer Agreement TBA containing the "requirements" clause was used in place of the Distributor Agreement. [R. 171, 1314, 212, 287, 1070.] In 1944 the Petroleum Products and Equipment Agreement containing the "requirements" clause also came into use. [R. 171, 287, 1071.]

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[16]Various printings of these Dealer Agreements in 1938, 1940, 1941, 1942, 1943 and 1944 all contain the so-called "requirements" clause. [R. 1788-1821; 1070.]

Thus, Standard has continuously employed the "requirements" clause in contractual relations with independent dealers since 1938.

**Standard's Sales to Dealers Without a "Requirements" Contract.**

A dealer desiring to handle Standard's products (other than tires, tubes and batteries) may obtain them from Standard without entering into any written contract.

Standard will and does sell a dealer gasoline without a contract of any kind [R. 1074, 1316, 212], even where the dealer is selling the petroleum products (other than gasoline), or the tires, tubes or batteries of one of Standard's competitors. [R. 1074.] Standard will and does sell a dealer lubricating oil without a contract of any kind, even where the dealer is selling the gasoline or the tires, tubes, or batteries of one of Standard's competitors. [R. 1074, 1075.]

The foregoing has been Standard's practice for a number of years. [R. 1075.]

Standard will sell automobile accessories (other, than tires, tubes and batteries) to a dealer without a contract of any kind, even where the dealer is selling the petroleum products (other than gasoline) or the tires, tubes or batteries of one of Standard's competitors. [R. 1076.]

Standard will not sell a dealer its gasoline if such dealer also handles gasoline purchased from someone else. [R. 242, 269, 1127.] This is and has been for years the almost universal practice of all gasoline suppliers in the Western area. A service station handling the gasoline of more than one supplier is known as a "split-pump" station. [R. 265.] Out of 36,500 retail outlets in the Western area in 1948 only 577 outlets, or 1.6% of the

total, were "split-pump" outlets. [R. 1062, 1763-1777, 1064.] At the time of the trial Standard's six largest competitors were serving only 119 "split-pump" accounts. [R. 1547, 856, 1537, 867, 1566-1568B, 874, 1590, 879, 1610, 882, 1619, 887.]

Standard discontinued sales to "split-pump" stations about 1938 or 1939. [R. 269.] A "primary reason" for this was the danger of substitution. [R. 1106.] Experience had demonstrated the danger of what is called "long-hosing" by the dealer, *i. e.*, the furnishing of a brand of gasoline not requested by the customer by means of a long hose from a pump adjacent to the pump from which the customer believed he would be served when he stopped his car at the "pump block." [R. 1106, 1107.] There is also a danger of substitution in the sale of lubricating oil if more than one supplier's brand is carried by the dealer. [R. 1107.] Other reasons prompting a discontinuance of "split-pump" stations were the dealers' preference for handling the products of a single supplier [R. 266], and a higher delivery cost in the case of "split-pump" stations. [R. 266.] By 1938 or 1939 "split-pump" stations were in "process of eliminating themselves" because "dealers generally did not want to merchandise in that manner." [R. 269.][17]

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[17]E. J. McClanahan, Standard's vice-president in charge of marketing, testified that prior to 1938 or 1939 Standard served "split-pump" accounts. [R. 269.]. About that time "split-pump" accounts were in "process of eliminating themselves." [R. 269.] Dealers "generally did not want to merchandise in that manner. It was not a sound policy for them." [R. 269.] The "dealers themselves are not favorable to dividing their interests with suppliers, for two basic fundamental reasons: They haven't the merchandising support from the supplier like they would have if that supplier knew that they were constantly selling his product; and secondly, they haven't an assurance of supply. There is no obli-

Standard will not sell tires, tubes, or batteries to a dealer unless the dealer will sign a Dealer Agreement TBA. [R. 1075.]

Standard will not sell automobile accessories (other than tires, tubes and batteries) to a dealer unless such dealer sells Standard's gasoline. [R. 1075, 1076.]

A dealer desiring to buy Standard's petroleum products may freely elect to execute either a Dealer Agreement, or a Dealer Agreement TBA. If he elects to execute the

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gation on the part of the supplier to continue supplying a split pump account such as there is on a long-term, secured tenure arrangement with what we call a 100 per cent account." [R. 266.] Illustrative of what he meant by lack of "merchandising support" in the case of a "split-pump" account, Mr. McClanahan testified that such an account "carries what we term a neutral color scheme and his place of business is not identifiable by the mobile buying public such as it would be if he represented the advertised products of a supplier. It is difficult for a buyer to single out the particular product that he wants. That is one phase of it." [R. 267.]

"Split-pump" accounts were also objectionable from the standpoint of the company.

Mr. McClanahan testified that "experience has proven that they ["split-pump" accounts] tend to misrepresent the products to the trade. Oftentimes they sell a gasoline out of one pump that the customer may think he is buying from another, creating what we call substitution. We have known of many instances where they have transferred the products from an underground tank to another tank, where it is sold under another brand, because of some temporary compensation that they might get from that particular supplier." [R. 266.] ". . . we have had accounts, where we have had the trademark and the color in the pump, and the account has sold gasoline from that pump for six months, and we haven't delivered a gallon of gasoline to the dealer in six months, but the meters on that pump showed a tremendous output." [R. 273.]

E. D. Thompson, Standard's manager of dealer sales, testified that the "primary reason" Standard ceased selling gasoline to

Dealer Agreement, he will be obligated to buy his petroleum products "requirements" for a specified station from Standard, but is contractually free to and in many cases does purchase his tires, tubes, batteries and accessories from a competitor of Standard. [R. 1075, 1313, 212, 1301-1303, 211.] The same thing is true with respect to a dealer who elects to execute a Petroleum Products and Equipment Agreement, but not a Dealer Agreement TBA. [R. 1076, 1313, 212, 1305-1307, 211.]

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"split-pump" accounts was because of the danger of "substitution": that "split-pump" accounts substituted competitive products for Standard's products, "in many instances making such sales on the company's credit cards." The pumps generally "would be on a single pump block, and a customer attracted to the station—if our colors and signs were displayed, a customer desiring our products would be attracted to the station, and in pulling up to the pump block would naturally expect to receive the product that was generally identified in that unit, and it was very easy for the dealer to take the hose from some other pump, and without being observed by the motorist put the gasoline in the tank." [R. 1106, 1107.] This practice was called "long-hosing," *i.e.*, the dealer "usually had a pretty long hose on the gasoline" he "chose to push" and "could reach almost any pump block area with a hose from this pump." [R. 1107.]

Mr. Thompson also testified that in the case of "split-pump" stations there was "danger of substitution in the case of lubricating oil." [R. 1107.]

Mr. McClanahan also testified that it cost "on an average from a cent to a cent and a half a gallon more to serve a split-pump account" because of "the uncertainties of deliveries, the uncertainty of quantities and the constant sales follow-up that is required to maintain representation with that account." [R. 266.]

A graph which is in evidence [R. 1862, 1139] confirms this. It shows that the cost of delivering gasoline to a service station rises disproportionately as the size of the individual delivery diminishes.

A dealer who executes a Dealer Agreement TBA is under no obligation to buy from Standard his requirements of accessories other than tires, tubes and batteries.[18]

**Standard's Powerful and Aggressive Competitors in the Western Area.**

Standard's largest oil competitors in the Western area are Shell Oil Company, Incorporated, Tide Water Associated Oil Company, General Petroleum Corporation, The Texas Company, Union Oil Company of California, and

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[18]Paragraph 2 of the Dealer Agreement TBA, after referring to tires, tubes and batteries, reads:

> "Company will deliver to Dealer such other merchandise currently sold by Company *that Dealer wishes to handle hereunder,* in quantities necessary in opinion of Company to meet Dealer's requirements at said premises." [R. 1308, 211.]

This is the only sentence in any of the agreements or in the sublease which can be deemed to include automotive accessories other than tires, tubes and batteries.

~~The italicized~~ words leave it entirely optional with the dealer whether he will buy automotive accessories, other than tires, tubes and batteries, from Standard at all or to any extent. If he does not "*wish*" to handle such merchandise, he is under no obligation to do so. *He does not agree to buy any of this merchandise from Standard. He does not agree that he will not buy this type of merchandise from one of Standard's competitors.* If he elects to buy this type of merchandise from Standard, the last part of the sentence ("in quantities necessary in the opinion of the Company to meet Dealer's requirements at said premises") is designed to protect Standard against demands by the dealer for quantities in excess of those which Standard can currently supply, and in practice this has been the way this clause has been interpreted. [R. 1071, 1072.]

*A dealer under a Dealer Agreement TBA* (or for that matter under any other form of "requirements" contract) *was always free to handle the accessories, other than tires, tubes and batteries, of Standard's competitors.* [R. 1076.]

Richfield Oil Corporation. In 1946 their petroleum products, tires, tubes, batteries and accessories, competitive with Standard, were distributed throughout the Western area through 20,502 dealer outlets[19] and 383 company-operated outlets [R. 1517, 856, 1535, 867, 1566-1568B, 874, 1618A, 885, 1589, 879, 1619, 887]. In the same year these six competitor companies sold through such outlets approximately 1,709,874,556 gallons of gasoline and approximately 33,989,666 gallons of lubricating oil [R. 1517, 856, 1536A, 867, 1566-1568B, 874, 1589, 1590, 879, 1618B, 1618C, 885, 1620, 1621, 887]. In that year Standard sold through independent retail dealers 268,-568,000 gallons of gasoline and 6,067,782 gallons of lubricating oil [R. 1656, 1660, 939].

Standard has many other competitors in the Western area selling their products through service station outlets. As above noted, the six companies referred to distribute their products through 20,502 dealer outlets and 383 company-operated outlets. Standard distributes its products through 5939 dealer outlets and 1063 company-operated stations [R. 1315, 1316, 212]. Thus Standard and its six largest competitors distribute through 27,887 outlets. However, early in 1947 the total number of retail gasoline outlets in the entire Western area, including company-operated stations, was approximately 36,500 [R. 1061, 1763-1777, 1064]. According to the 1946 gasoline tax statistics there were 80 companies operating in one or more of the states of the Western area, each of

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[19] Of these Shell had 4202 [R. 1535, 867]; General Petroleum 3915 [R. 1566-1568B, 874]; Texas 3842 [R. 1589, 879]; Union 3389 [R. 1618A, 885]; Associated 2621 [R. 1517, 856]; and Richfield 2533 [R. 1619, 887].

which had annual taxable gasoline sales of more than 1,000,000 gallons of gasoline [R. 1675, 1676, 939]. In 1946 in the Los Angeles basin area alone companies other than Standard and the six companies named above supplied gasoline to 2919 service stations, and in the San Francisco bay area alone to 551 service stations [R. 1649, 1652, 910].

Standard's competitors named above sell their own brands of *lubricating oil* through the dealer stations handling their gasoline [R. 857, 865, 872, 877, 880, 881, 886, 1069]. Additionally, there are a number of other brands of lubricating oil sold to a multitude of retail outlets throughout the Western area in competition with the products of Standard and the companies named above—such brands as "Pennzoil," "Quaker State," "Hyvis," "Conoco," "Kendall," "Macmillan," "Wolf's Head," "Mohawk Penn," "Wilshire," and "Phillips." [R. 317, 318, 335, 336, 454, 455, 478, 479.] In 1946, in addition to the competitor companies named above, there were 62 competitor companies marketing their own brands of lubricating oil in one or more of the states of the Western area [R. 1864, 1865, 1148]. Some of these competing brands of lubricating oil were sold in large volume through a multitude of retail outlets.[20]

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[20]For example, *Pennzoil*, selling in 1916 in the Western area through probably less than 2,000 retail outlets, was selling in 1946 in that area through between 8,000 and 12,000 retail outlets, according to the testimony of its president, called as a government witness. [R. 375, 376.] According to another government witness, *Macmillan* in 1947 was selling in that area to approximately 9,000 to 10,000 accounts—a greater number of accounts than in 1946. [R. 324.] In Los Angeles County and the fourteen counties surrounding Sacramento, *Quaker State* was sold through 4,000 to 5,000 retail outlets [R. 464] according to the testimony of its vice-president, also a government witness.

Numerous companies likewise sell their *tires, tubes and batteries* through numerous retail outlets in the Western area.[21] "Pennsylvania," "Goodyear," "Firestone," "Fisk," "Mohawk," "United States," "General," "Gates," "Federal," "Mobile," "Armstrong," "Kelly Springfield," "Dayton," "Miller," "Montgomery Ward," and "Sears Roebuck" are some of the brands of tires competing in that area with Standard's "Atlas" brand of tires. [R. 514, 515, 550, 551, 552, 554, 555, 567, 577, 578.] "Auto-Lite," "Hobbs," "Mobil," "Signal," "States," "Olympic," "Dunlop," "Exide," "Goodrich," "Goodyear," and "Firestone" are some of the brands of batteries competing with Standard's "Atlas" batteries. [R. 627, 630, 633.] These lists are by no means complete; for there was uncontradicted testimony of a recent "check" which disclosed that companies competing with Standard in the sale of gasoline through retail dealers were promoting 27 lines of tires and 28 lines of batteries. [R. 1069.] Of course tires and batteries, as distinguished from gasoline and lubricating oil which are retailed chiefly through service stations and garages, are sold at retail at many outlets other than service stations and garages.

The other oil companies compete with Standard for the patronage of the dealer. They employ the same methods as Standard to induce the dealer to buy from

[21] A government witness who was a Los Angeles wholesale dealer in tires and batteries testified that in 1947 he sold products competing with "Atlas" products to approximately 7,000 service stations and garages in the Western area, this being double the number of outlets which had purchased from him the year before. [R. 577, 581.] Another Los Angeles distributor of tires and batteries other than "Atlas," also a government witness, testified that in 1946 he did a business of close to $1,500,000 in California, Nevada and Arizona, and that in 1947 this figure was a little higher. [R. 591, 592, 595.]

them.[22] The dealer contracts and sublease arrangements of Standard's principal competitors are in general similar to those of Standard.[23] [R. 1518, 1524, 859, 1538, 1554, 867, 1569, 1578, 874, 1590, 1603, 879, 1611, 1615, 882, 1621, 887.]

**Standard's Percentage of the Total Business.**

**Gasoline.**

Standard's gasoline is sold to the motoring public (a) through its company-operated stations, known as "Standard Stations," and (b) through independent dealers. [R.

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[22] The uncontradicted evidence showed that other companies compete "very aggressively" with Standard in the sale of petroleum products, tires, tubes, batteries and accessories [R. 1065]; that they compete with Standard for the purpose of obtaining sites for service stations [R. 1065], also for the purpose of taking over the patronage of existing dealers [R. 1067]; and that they offer dealers inducements for "the purpose of getting one of . . . Standard's dealers." [R. 1068.]

[23] *Shell* for 10 years or more [R. 866] has used a "100% Dealer Gasoline Contract" and a "100% Dealer Gasoline Contract and Paint Work and Sign Agreement" obligating Shell to sell to the dealer and the dealer to buy from Shell "all gasoline and motor fuel" which the dealer "may require for resale at" the dealer's premises situated at a specified location, and providing that the dealer "shall not store or sell . . . any gasoline on or from said premises . . . except as acquired from Shell." [R. 1544, 1547, 867.] For a like period [R. 866] Shell has also used a "Shellubrication Dealer's License Agreement" providing that Shell grants to the dealer the right to use "Shellubrication" at a specified location, and the dealer "agrees to use, advertise and display only lubricating oils and greases obtained from Shell in connection with the performance of 'Shellubrication' service" and "to keep on hand at all times and to display a representative stock of automotive lubricants acquired from Shell. . . ." [R. 1538C, 867.] For a like period [R. 866] Shell has also used a "Loaned Equipment Agreement" by which Shell agrees to loan the dealer certain equipment and the dealer agrees "not to permit said equipment to be used in any manner except for the storage and sale of petroleum products purchased from Shell." [R. 1542, 867.]

*Associated* for 10 years [R. 859] has used a "Dealer Sales Agreement" and a "Petroleum Products Sales Agreement" obligat-

1057, 1058.] We will call the former "Standard Stations sales," and the latter "dealer sales." It also sells gasoline, as well as other petroleum products, (c) directly to large industrial, commercial and agricultural users. [R. 1018, 975, 976.] We will refer to these as "industrial sales." The Standard Stations sales and industrial sales are not involved in this suit.[24]

What are the total sales in the Western area by all suppliers with which Standard's dealer sales of *gasoline* are to be compared?

The available figures [R. 1116, 1117] which are accurately informative are those published by the tax authorities of the several states showing taxable gasoline gallon-

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ing Associated to sell and deliver to the dealer and the dealer to purchase from Associated all petroleum products "required by Buyer . . . for resale from Buyer's premises" at a specified location. [R. 1527, 1529, 859.] Associated has also used for about 7 years [R. 859] a "Merchandise Agreement" which obligates Associated to sell and deliver to the dealer and the dealer to purchase from Associated "all tires, tubes, batteries and accessories and/or auto supplies required by Buyer for resale" at a specified station. [R. 1524, 859.]

*General Petroleum* for "probably 6 or 7 or 8 years" [R. 873] has used a Dealer Gasoline Contract obligating the company to sell and deliver to the dealer and the dealer to purchase from the company the "Dealer's ordinary trade requirements of gasoline for resale" at a specified service station location. [R. 1578, 874.]

*Union, Richfield* and *Texas* have used contracts providing for the sale to and purchase by the dealer of not less than a stated "minimum" quantity and not to exceed a stated "maximum" quantity of petroleum products for resale over a specified period. [R. 1615, 882, 1621, 887, 1590, 1597, 879.] *Richfield* also uses [R. 887] an Operator's Sales Contract which obligates Richfield to sell to the dealer, and the dealer to buy from Richfield the dealer's "entire requirements" of gasoline, lubricating oils and greases "for resale" during a stated period from a specified service station, but not less than a stated monthly minimum quantity. [R. 1643, 887.]

[24]The issues framed by the pleadings relate solely to "supply contracts" with the "independent service station operators" and "garage operators." [R. 7.]

age. [R. 928-932.] These figures are in evidence. [R. 1653, 939.] These figures which we will refer to as "taxable gallonage," include not only gasoline sold through service stations and other retail outlets, but also what we have referred to as industrial sales. [R. 931, 946, 1116, 1117.]

In the Western area in 1946:

Standard's *dealer sales* of gasoline were 6.7% of the total taxable gallonage. [R. 1656, 939.]

Standard's *"Standard Stations" sales* of gasoline (not involved in this suit) were 6.8% of the total taxable gallonage. [R. 1656, 939.]

Standard's *dealer sales plus Standard Stations sales* of gasoline were, therefore, 13.5% of the total taxable gallonage.

Standard's *dealer sales plus Standard Stations sales plus industrial sales* of gasoline (the last two not being involved in this suit) were approximately 23%[25] of the total taxable gallonage.

The District Court found that "Standard sells between 12 and 14 per cent of all the gasoline sold or distributed through independent retail dealer outlets in the Western area." [R. 182.] This finding compares Standard's dealer sales *plus Standard Stations sales* with total sales

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[25]The District Court found [R. 182]: "Standard sold approximately 23 per cent of all the gasoline sold in the Western area during the year 1946." This finding was based *solely* on the testimony of E. J. McClanahan, Standard's vice president, in charge of marketing. His testimony makes it perfectly clear that this 23% estimate included gasoline sold by Standard not only through dealers, but also Standard Stations sales and industrial sales of gasoline. Mr. McClanahan said that this 23% represented *"all gasoline sold . . . to all classes of trade."* [R. 222.]

through independent dealer retail outlets.[26] Since Standard's dealer sales in 1946 were approximately 50% of its dealer sales plus Standard Stations sales, this amounts to a finding that Standard's dealer sales (the sales involved in this suit) are between 6 and 7 per cent of all gasoline distributed through independent retail dealer outlets.

This finding was based on testimony [R. 223, 1116] which was an estimate. It was necessarily an estimate, because no one knows exactly what percentage of the total taxable gallonage is represented by gasoline which moves *through dealer outlets only*. [R. 1116, 1117.]

Therefore, in referring herein to Standard's percentage of the gasoline dealer business we shall refer to the percentage established by the uncontroverted statistics in evidence, *i. e.*, the percentage of the total taxable gasoline gallonage represented by Standard's *dealer sales* (the sales involved in this suit), which was 6.7%.[27]

**Lubricating Oil**

What are the total sales in the Western area by all suppliers with which Standard's dealer sales of *lubricating oil* are to be compared?

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[26]This finding was based *solely* on the testimony of E. J. McClanahan, Standard's vice president in charge of marketing, and the testimony of E. D. Thompson, Standard's manager of dealer sales. An inspection of their testimony clearly shows that they included not only dealer sales, but also Standard Stations sales of gasoline in this estimate of "between 12 and 14 per cent." [R. 223, 1116.]

This was evidently the interpretation of Mr. Dixon, who was in charge of the government's case at the trial. In final argument he said: "If there is any question about that, I submit it is put to rest by the testimony of Mr. McClanahan . . . where he estimated that percentagewise his company had between 12 and 14 per cent *of the total retail sales* of petroleum products in the Western area. . . ." [R. 1173.]

[27]Standard Stations sales of gasoline in that year were 6.8% of the total taxable gallonage. [R. 1656, 939.]

The available figures which are accurately informative are the lubricatng oil sales figures published by the American Petroleum Institute's Economics Division. [R. 933.] These figures are in evidence. [R. 1657, 939.]

Standard's *dealer sales* in 1946 of *lubricating oil* in the Western area were 5% of such total taxable lubricating oil sales in that area. [R. 1660, 939.][28]

**Tires.**

What are the total sales in the Western area by all suppliers with which Standard's dealer sales of *tires* are to be compared?

The available figures which are accurately informative are those showing total replacement[29] tire shipments published by the Rubber Manufacturers' Association. [R. 934.] These figures are in evidence. [R. 1661, 939.]

Standard's *dealer sales* in 1946 of *tires* in the Western area were 2% of such total replacement tire shipments in that area. [R. 1664, 939.][30]

**Batteries.**

What are the total sales in the Western area by all suppliers with which Standard's dealer sales of batteries are to be compared?

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[28] Standard Stations sales of lubricating oil in that year were 3.8% of such total. [R. 1660, 939.]

[29] "*Replacement*" figures are used so as to exclude tires and batteries first installed on new cars at the time the latter are assembled at the factory. Nationwide figures are broken down for the states of the Western area on the basis of motor vehicle registrations. [R. 934.]

[30] Standard Stations sales of tires in that year were 1.9% of such total. [R. 1664, 939.]

The available figures which are accurately informative are those showing total battery replacements published by the Association of American Battery Manufacturers (1933 to 1938) and Dun & Bradstreet, Inc. (1939 to 1946). [R. 935.] These figures are in evidence. [R. 1665, 939.]

Standard's *dealer sales* in 1946 of *batteries* in the Western area were 1.8% of such total battery replacements in that area. [R. 1668, 939.][31]

**Standard's Failure to Increase Its Percentage of the Total Business During the Long Period the "Requirements" Contracts Have Been in Use.**

There has been no lessening of competition during the years that the "requirements" contracts have been used. During that period Standard no more than maintained its relative position as a wholesaler among its competitors and in the case of lubricating oil actually lost ground to its competitors.

Standard in 1938 and 1939 had about 8500 retail dealer outlets in the Western area. [R. 238.] In 1947 Standard had only 5939 such outlets. Of the latter, 5197 had contracts or subleases with "requirements" clauses. [R. 1315, 1316, 212.]

Standard has continuously followed the policy of contracting with the fewest possible retail dealers consistent with a coverage of the area to be served. [R. 1076,

[31]Standard Stations sales of batteries in that year were 2.8% of such total. [R. 1668, 939.]

1077.][32] The result is pointedly illustrated by the conditions prevailing in 1946 in the populous Los Angeles basin area and San Francisco bay area. In the Los Angeles basin area Standard's dealer stations were 3.68% of the total service stations and its gasoline sales to such dealer stations were 2.43% of the total gasoline gallonage distributed through all stations in such area. [R. 1649, 910.] In the San Francisco bay area Standard's dealer stations were 6.98% of the total service stations and its gasoline sales to such dealer stations were 5.52% of the total gasoline gallonage distributed through all stations in such area.[33] [R. 1652; 910.]

To show Standard's position in relation to its competitors *from year to year over a period during which the "requirements" contracts were in use*, Standard introduced

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[32]From 1931 to 1941 Standard constructed 8% of the new retail outlets that were constructed by all companies. From 1942 to 1947 it constructed 8.7% of such new outlets. [R. 1079.] In the populous Long Beach (California) district on July 15, 1947, Standard had no service stations under construction and its competitors were constructing 48 service stations. [R. 1785, 1066, 1067.]

There was uncontradicted testimony that Standard sought to avoid contracting with many outlets in a given area, because such concentration would result in higher distribution costs. [R. 1077.]

[33]The smaller competitor companies (*i.e.* companies *other than* Standard, General Petroleum, Texas, Union, Associated, Shell and Richfield) had 47.15% of the service stations and supplied 43.60% of the gasoline gallonage to service stations in the Los Angeles basin area, and had 28.49% of the service stations and supplied 23.94% of the gasoline gallonage to service stations in the San Francisco bay area. [R. 1649, 1652, 910.]

In the Los Angeles basin area Standard's company-operated stations (Standard Stations) were 4.70% of the total service stations and its gasoline sales through such company-operated stations were 8.71% of the total gasoline gallonage distributed through all stations in such area. [R. 1649, 910.] In the San Francisco bay area Standard's company operated stations were 8.43% of the total service stations and its gasoline sales through such company-operated stations were 14.17% of the total gasoline gallonage distributed through all stations in such area. [R. 1652, 910.]

in evidence statistics and graphs [R. 1653-1673, 939] showing Standard's retail dealer sales as compared with total industry sales in the Western area of motor gasoline, lubricating oil, tires and batteries. These show that Standard's dealer sales in the Western area were a *percentage* of industry total sales as shown below:

| | (1)[34] Gasoline (%) | (2)[35] Lubricating Oil (%) | (3)[36] Tires (%) | (4)[37] Batteries (%) |
|---|---|---|---|---|
| 1931 | 7.6 | | | |
| 1932 | 6.7 | | | |
| 1933 | 6.4 | | .1 | |
| 1934 | 7.1 | | .3 | 0.3 |
| 1935 | 6.4 | | .6 | 0.6 |
| 1936 | 6.9 | 6.2 | .9 | 0.9 |
| 1937 | 6.1 | 6.1 | 1.3 | 1.3 |
| 1938 | 6.7 | 6.0 | 1.4 | 1.4 |
| 1939 | 6.6 | 6.5 | 1.2 | 1.6 |
| 1940 | 6.1 | 6.8 | 1.3 | 1.7 |
| 1941 | 6.5 | 6.0 | 1.2 | 1.8 |
| 1942 | 6.5 | 5.0 | .6 | 1.9 |
| 1943 | 5.5 | 5.9 | 1.5 | 1.9 |
| 1944 | 5.1 | 4.2 | 1.5 | 2.0 |
| 1945 | 5.7 | 4.1 | 1.6 | 1.9 |
| 1946 | 6.1 | 5.0 | 1.3 | 1.8 |

[34]Column (1) shows the percentage which Standard's retail dealer sales of gasoline bear to all taxable gasoline sales. The latter figures are published by the tax authorities of the several states [R. 1656, 939, 928-932], and include not only gasoline sold through retail dealer outlets, but gasoline sold to industrial, commercial and agricultural users. [R. 931, 946, 1116, 1117.] However, the witness Dern testified without contradiction that the total of taxable gasoline sales rises and falls *in the same proportion* as the total of retail sales of gasoline. [R. 931, 946.] Therefore, to determine whether Standard's competitive position has improved or deteriorated over a period of years, it is proper to compare its retail dealer sales with these taxable sales.

Over the years Standard's dealer sales increased, but so did the volume of sales in the industry generally. Market demand in Western area increased tremendously.

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[35]Column (2) shows the percentage which Standard's retail dealer sales of lubricating oil bear to total taxable lubricating oil sales. The latter figures are published by the American Petroleum Institute's Economics Division. [R. 1660, 939, 933.]

[36]Column (3) shows the percentage which Standard's retail dealer sales of tires bear to total tire replacement shipments, according to figures published by the Rubber Manufacturers Association, the latter being broken down for the states of the Western area on the basis of motor vehicle registrations in such states. [R. 1664, 939, 934.]

[37]Column (4) shows the percentage which Standard's retail dealer sales of batteries bear to total battery replacements, according to figures published by the Association of American Battery Manufacturers (1933 to 1938) and Dun & Bradstreet, Inc. (1939 to 1946), such figures being broken down for the states of the Western area on the basis of motor vehicle registration in such states. [R. 1668, 939, 935.]

The following percentages show the relation between Standard Stations sales (*i.e.* sales through the company-operated stations) in the Western area and total industry sales in that area of motor gasoline, lubricating oil, tires and batteries during such period. [R. 1656, 939, 1660, 939, 1664, 939, 1668, 939.]

| | Gasoline (%) | Lubricating Oil (%) | Tires (%) | Batteries (%) |
|---|---|---|---|---|
| 1931 | 3.8 | | | |
| 1932 | 4.7 | | | |
| 1933 | 4.7 | | 3.5 | |
| 1934 | 5.2 | | 4.0 | 2.0 |
| 1935 | 4.8 | | 3.8 | 2.1 |
| 1936 | 4.4 | 3.0 | 3.8 | 2.1 |
| 1937 | 4.5 | 3.1 | 3.6 | 2.4 |
| 1938 | 4.7 | 3.3 | 3.7 | 2.4 |
| 1939 | 4.8 | 3.5 | 3.3 | 2.4 |
| 1940 | 4.9 | 3.5 | 3.5 | 2.3 |
| 1941 | 5.3 | 3.7 | 3.1 | 2.5 |
| 1942 | 5.4 | 3.5 | .7 | 2.9 |
| 1943 | 4.3 | 2.8 | 2.7 | 2.0 |
| 1944 | 3.4 | 2.4 | 1.5 | 1.7 |
| 1945 | 4.5 | 2.6 | 1.6 | 1.8 |
| 1946 | 6.8 | 3.8 | 2.2 | 2.8 |

Total taxable *gasoline* sales in 1936 in the Western area were 2,442,319,000 gals. By 1946 such sales were 4,023,342,000 gals. [R. 1656, 939.] Assuming a price of 18¢ per gal.,[38] the dollar volume of these sales in 1946 would be $724,201,560.00.[39]

Total *lubricating oil* sales in 1936 in the Western area were 59,704,600 gals. By 1946 such sales were 122,281,383 gals. [R. 1660, 939.] Assuming a price of 50¢ per gal.,[40] the dollar volume of these sales in 1946 would be $61,140,691.00.[41]

Standard's increase in dealer sales of gasoline and lubricating oil was proportionately less than the increase in the total sales in the industry in the Western area.

Comparing 1936 with 1946 Standard's increase in dealer sales of *gasoline* was 58%. [R. 1656, 939.] As shown above, sales in the industry increased 64%. [R. 1656, 939.] Comparing 1936 with 1946, Standard's increase in dealer sales of *lubricating oil* was 62%. [R. 1660, 939.] As shown above, sales in the industry increased 104. [R. 1660, 939.]

Moreover, Standard's increase was not nearly as great as the increase in volume of dealer sales of certain of its competitors. Thus, comparing 1941 with 1946 Standard's increase in dealer sales of *gasoline* was 26% [R.

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[38]This was an assumption employed by the government in arriving at the dollar volume of Standard's gasoline sales for 1946. [R. 820.]

[39]Standard's dollar volume in that year was found to be $48,342,374.62. [R. 180.]

[40]This was the price at which the government assumed that Standard sold its RPM lubricating oil to dealers in 1946. [R. 821.]

[41]Standard's dollar volume in that year was found to be $3,246,263.83. [R. 180.]

1656, 939], whereas over the same period Union's increase was 90% [R. 1618B, 885]; General Petroleum's increase was 165% [R. 1566-1568B, 874]; and Associated's increase was 34%. [R. 1516, 1517, 856.] Comparing 1941 with 1946, Standard's increase in dealer sales of *lubricating oil* was 43% [R. 1660, 939], whereas over the same period Union's increase was 98% [R. 1618C, 885]; General Petroleum's increase was 174% [R. 1566-1568B, 874]; and Associated's increase was 55%. [R. 1516, 1517, 856.]

## SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

The following assignments of error, relevant to the following points presented in the argument herein, are intended to be urged:

The assignments relevant to Points II(1), II(2) and II(3) of the argument are: 1 [R. 1867], 4 [R. 1870], 5(a) to 5(r), inclusive [R. 1870-1872], 6(a) to 6(k), inclusive [R. 1872, 1873], 7 [R. 1873-1875], and 12 [R. 1875.]

The assignment relevant to Point III(1) of the argument is: 2(d). [R. 1868.]

The assignments relevant to Point III(3) of the argument are: 2(a) to 2(c), inclusive [R. 1867], 2(e) to 2(j), inclusive [R. 1868], and 3(i) to 3(l), inclusive. [R. 1869, 1870.]

The assignments relevant to Point III(4) of the argument are: 4 [R. 1870], and 5(a) to 5(r), inclusive. [R. 1870-1872.]

The assignments relevant to Point III(5) of the argument are: 2(k) to 2(m), inclusive [R. 1868, 1869], and 3(d) to 3(g), inclusive. [R. 1869.]

## SUMMARY OF ARGUMENT.

### I.

The District Court concluded that Standard's "requirements" contracts were unlawful solely because (a) more than 5000 dealers were affected, and (b) a large dollar volume of products was handled thereunder. In its opinion it stated that it was "compelled to find the practices here involved to be violative of both the Sherman and Clayton Acts since they affected "an appreciable segment" of commerce.

Proceeding upon this narrow factual foundation and misapplying the "appreciable segment" of commerce theory, the District Court excluded competent evidence as to the effect on competition of an elimination of the "requirements" clauses; as to the economic aspects of a "split-pump" distribution system as compared with the present single-supplier system; as to whether the "split-pump" system is inherently and from the economic standpoint a more expensive distribution system; as to the effect of the "requirements" contracts on prices; and as to the economic merits or demerits of the present system as contrasted with a system which might prevail if the "requirements" clauses were eliminated. The District Court stated that any advantages which resulted to the dealer and indirectly to the public from the "requirements" contracts was "not a proper subject of inquiry."

Consonant with its erroneous application of the "appreciable segment" of commerce theory, the District Court, although its attention was invited to their importance in the light of *United States v. Columbia Steel Co.*, 334 U. S. 495, 527, failed to make findings of fact with reference to the following factors: the number of dealers who

handle the products of Standard's competitors, and whether such number had increased or decreased; the number of Standard's competitors, and whether such number had increased or decreased; the volume of products handled by Standard's competitors, and whether such volume had grown or declined in comparison with Standard's volume; the fact that the increase in consumer demand and consumption had been greater than the increase in Standard's dealer sales; Standard's practice in supplying dealers without contracts, and the dealer's freedom of choice in selecting a supplier with whom to contract, and, if he selected Standard, the type of contract to be executed; the fact that dealers under contract with Standard did not have the "favorably situated" outlets, or a monopoly in any given area; the decrease in the number of Standard's dealer outlets; the practices of Standard's competitors in seeking contracts and in contracting with dealers; the general adoption of a single-supplier system of gasoline distribution in the Western area by a multitude of dealers handling the products of Standard's competitors; the reasons for a dealer's handling the products of a single supplier; and the probable effect upon competition of an elimination of the "requirements" contracts.

II.

The District Court erred in thus disregarding the competitive and economic background. It should have weighed the evidence which was received showing such background. It should have received and weighed the evidence touching such background which it excluded. Defendants were entitled to have all such evidence considered and weighed by the trier of fact.

Under both the Sherman and Clayton Acts the District Court should have applied a "rule of reason"—the test of

presence or absence of prejudice to the public interest. (*Nash v. United States*, 229 U. S. 373, 376; *International Shoe Co. v. Comm'n.*, 280 U. S. 291, 298.) Applying such test the District Court should have considered and weighed all facts bearing upon the competitive and economic background.

This was not a case which could properly be decided solely by resort to an "appreciable segment" of commerce theory, for in this case there was no restraint which was "illegal *per se*," and there was "no specific intent to accomplish a forbidden restraint." (*United States v. Columbia Steel Co.*, 334 U. S. 495, 522.)

The District Court should have determined the reasonableness or unreasonableness of the alleged restraint by considering and weighing *all* of the factors entering into the competitive and economic background, instead of *deciding that there was unreasonableness solely because an "appreciable segment" of commerce was affected by the contracts.*

There being no restraint "illegal *per se*," nor any "intent to accomplish a forbidden restraint," the broad scope of the factors which the District Court should have weighed is indicated in *Chicago Board of Trade v. United States*, 246 U. S. 231, 238; *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 360; *Standard Oil Co. v. United States*, 283 U. S. 163, 177, 182; and *United States v. Columbia Steel Co.*, 334 U. S. 495, 524. The District Court did not weigh these factors. *It considered only Standard's operations, divorced from the factors comprising the competitive and economic background.* If these factors were material in the *Columbia Steel* case, they were certainly material in our case. In the former exclusive dealing was brought about through vertical integration and was permanent. In our case exclusive dealing is

alleged to have been brought about by "requirements" contracts, but it lasts only during the limited period that such contracts can be enforced by the supplier.

III.

Upon the evidence in our record (and without reference to the evidence excluded and the District Court's error in so doing) the District Court erred in concluding that there was a violation of either the Sherman or Clayton Act.

In the first place, the "requirements" contracts do not fall within the purview of sec. 3 of the Clayton Act, since they do not require the purchaser to buy *all* his requirements from Standard, but only his requirements for resale *at a single specified retail outlet.* The obligation imposed upon the dealer by Standard's contracts is not shown to have had any broader effect than the obligation of the contracts upheld in *Federal Trade Comm. v. Sinclair Co.*, 261 U. S. 463.

In the second place, the "requirements" contracts are not an unreasonable restraint nor do they have the effect of substantially lessening competition or tending to create monopoly.

Granted that sec. 3 of the Clayton Act seeks to reach agreements embraced within its sphere in their incipiency, the contracts here in question have been in use for about nine years; thus their "effect" has been amply demonstrated. This was the view of the District Court. Therefore speculation as to their "probable" or "possible" future effect is unnecessary. Their legality should be adjudged by what has already occurred.

There was no unreasonable restraint. The facts shown in the opening Statement herein demonstrate this. A comparison of the facts of our case and the facts in *United States v. Columbia Steel Co.*, 334 U. S. 495, is especially

persuasive. After operating for about nine years under "requirements" contracts, Standard's gasoline sales through dealer outlets are only 6.7% of the total taxable gasoline gallonage; its dealer sales of lubricating oil are only 5% of the total; its dealer sales of tires are only 2% of the total; and its dealer sales of batteries are only 1.8% of the total. Contracts are not forced on dealers, either by the dealer's necessities, or otherwise. Dealers can buy gasoline or lubricating oil from Standard without a contract of any kind, and, at a moment's notice, switch their patronage to one of Standard's numerous competitors. Nor is a dealer desiring to contract with Standard forced to contract for the full line of Standard's products. If the dealer wants to contract for Standard's gasoline and lubricating oil, he is free to contract with Standard for these products and buy his tires, batteries and other automotive accessories from one of Standard's numerous competitors.

There was no substantial lessening of competition. The facts shown in the opening Statement herein demonstrate this. The "requirements" contracts having been in use for about nine years, the proof fails to show any diminution in the number of Standard's competitors, or in the size or power of such competitors, or that such competitors enjoy a smaller proportion of the available customers or volume of business. Such proof as the record contains is all to the contrary. Year by year Standard's proportion of the business has shown no increase and in the case of lubricating oil has shown an actual decrease. The number of Standard's dealer outlets has substantially decreased in nine years. Standard's competitors are shown to be numerous, powerful, and aggressive and most of its major competitors are shown to have employed "re-

quirements" contracts for a considerable period. Of the 36,500 retail outlets in the Western area handling the gasoline of Standard and its competitors, 98.4% are shown to be handling the gasoline of only one supplier. The primary reason for this is shown to be the danger of substitution if the product of more than one supplier is handled at a given outlet; and another reason is the dealer's own preference due to "assurance of supply" where the product of only one supplier is handled.

There was no monopoly or tendency to create monopoly. There has been no enlargement of an existing patent monopoly, as in the tying-clause cases: *United Shoe Machinery Corp. v. United States*, 258 U. S. 451; *International Business Machines Corp. v. United States*, 298 U. S. 131; and *International Salt Company v. United States* 332 U. S. 392; or of an existing actual monopoly, as in *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346. Standard has never had any patent monopoly or actual monopoly. Nor have privileges been exacted through the leverage of monopoly power, as in *United States v. Griffith*, 334 U. S. 100, 106; *Schine Theatres v. United States*, 334 U. S. 110, 116; and *United States v. Paramount Pictures*, 334 U. S. 131, 157, 158. Standard has never had monopoly power.

Finally, the decree should in any event except from its operation the contracts between Standard and *California* dealers. It has not been shown that such contracts contemplated or required or actually involved any movement of goods in *interstate* commerce. It has not been shown that such contracts restrained *interstate* commerce, or that they were "in the course of" or substantially affected such commerce. (*Addyston Pipe & Steel Co. v. United State*, 175 U. S. 211, 247; *United Shoe Machinery Co. v. United States*, 258 U. S. 451, 465.)

## ARGUMENT.

### I.

### THE DISTRICT COURT CONCLUDED THAT A VIOLATION OF THE ANTI-TRUST LAWS WAS CONCLUSIVELY ESTABLISHED SOLELY BECAUSE OF THE NUMBER OF DEALERS UNDER CONTRACT AND THE DOLLAR VOLUME OF PRODUCTS HANDLED THEREUNDER; THAT AN "APPRECIABLE SEGMENT" OF COMMERCE BEING THUS AFFECTED, DECISIONS OF THIS COURT COMPELLED THE CONCLUSION THAT DEFENDANTS' CONDUCT WAS UNLAWFUL IRRESPECTIVE OF ALL OTHER COMPETITIVE AND ECONOMIC FACTORS.

The District Court based its conclusion that Standard's "requirements" contracts were unlawful *solely* upon two factors: (a) the fact that there were more than 5000 dealers affected by these contracts; and (b) the fact that a large dollar volume of products was handled under these contracts. From these facts, the District Court concluded that an "appreciable segment" of commerce was affected; that this *conclusively established* a violation of the Act, everything else being inconsequential.

#### (1) This Conclusion Is Disclosed by the District Court's Opinion.

In its opinion of June 7, 1948, the District Court said:

"Substantiality of restraint or tendency to create monopoly *is established* by (a) the market foreclosed, —*here represented by the controlled units,*—and (b)

*the volume of controlled business, totaling here in value $68,000,000.00.*[42]

Fractionally speaking, the business done by the competitors with their own outlets or with those under contract is much greater than the business of Standard,—both in volume and in money value. *Nevertheless, the business of Standard is considerable. In effect, it amounts to a substantial lessening of competition and a monopoly of a sizeable segment* of a line of commerce in a definite area—the seven Western states." [R. 126.]

Concluding such opinion the District Court said:

"So we come to the end of our discussion. *As the restriction corners a market of the value of $68,000,000.00,*[42] *it is illegal, even considered on a comparative basis.* Concede further, that the arrangement was entered into in good faith, with the honest belief that control of distribution and consequent concentration of representation were economically beneficial to the industry and to the public, that they have continued for over fifteen years openly, notoriously and unmolested by the Government, and have been practiced by other major oil companies competing with Standard, that the number of Standard outlets so controlled may have decreased, and the quantity of products supplied to them may have declined, on a comparative basis. *Nevertheless, as I read the latest cases of the Supreme Court, I am compelled to find the practices here involved to be violative of both statutes. For they affect injuriously a sizeable part of interstate commerce, or,—to use the current phrase—'an appreciable segment' of interstate commerce."* [R. 130.]

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[42]The District Court's finding was $65,846,412.21—not $68,000,000. [R. 180.]

Thus the District Court's decision was based upon an "appreciable segment" of commerce theory. Such factors as "the percentage of business controlled, the strength of the . . . competition," whether the contracts sprang "from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market"[43] were brushed aside as being of no consequence.

**(2) This Conclusion Is Disclosed by the District Court's Exclusion of Evidence Offered by Defendants With Respect to the Effect on Competition of the Elimination of the "Requirements" Contracts and the Public Benefit From the System of Distribution Employed by Defendants and Their Competitors and the Public Detriment From the System of Distribution Which Would Ensue From an Abolition of the Contracts, and the District Court's Ruling That It Would Refuse to Allow Testimony Along This Line or Testimony Concerning the Effect on Prices, or the Economic Merits or Demerits of the Practices Complained of.**

The District Court's adoption of an "appreciable segment" of commerce theory resulted in the exclusion of evidence embracing a wide field of inquiry.

In this suit the government was seeking the elimination of Standard's "requirements" clauses.

For the purpose of determining the change, if any, which would ensue from an elimination of these clauses and the effect on the public of any such change, defend-

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[43] *United States v. Columbia Steel Co.*, 334 U. S. 495, 527 (1948).

ants called Robert W. Garrett, an expert shown to have familiarity through study and experience with problems incident to the marketing of petroleum products,[44] and propounded to him a series of questions. The government objected to each such question. Each such objection was sustained. [R. 1141-1144.]

These questions sought Mr. Garrett's opinion as to *the effect on competition of the elimination of "requirements" clauses generally;* whether such elimination would tend to a substantial increase in company-operated stations, or the promotion of dealer-operated chains of service stations; *what change, if any, would occur in the over-all competitive picture so far as it relates to suppliers of products to retail service station outlets if a "split-pump" system became general;* whether the elimination of "requirements" clauses by suppliers generally would increase or decrease the number of existing service stations, or give the more prominent suppliers a competitive advantage; as to *the economic aspects of the "split-pump" distribution system as compared with the present single-supplier system of distribution;* in the petroleum marketing field; *whether a "split-pump" system would increase the cost of distribution* as compared with the single-supplier system so far as either the dealer or the supplier is concerned; *whether the "split-pump" system is inherently and from the economic standpoint a more expensive system of distribution,* and whether, assuming that a "split-pump" system from the economic standpoint would be a more expensive system,

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[44]Following academic training in economics, Mr. Garrett's subsequent employment over a period of years led to intimate familiarity with gasoline marketing methods and problems generally, including cost under different methods of distribution. [R. 1135, 1136.]

e added expense thereunder would be ultimately borne the purchasing public.[45]

At the time of its ruling sustaining objection to these quiries, the District Court stated that it would not per- t testimony concerning the effect of the "requirements" ntracts on prices, or the economic merits or demerits the present system as contrasted with a system which ght prevail if the contract provisions attacked by plain- f were eliminated, and that *it was immaterial that eco- mic benefit might result from the present system or nomic detriment result from its abandonment.*

The District Court said:

> ". . . I am not going to allow any testimony regarding the effect of this arrangement on prices,

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[45]The specific questions, which Mr. Garrett was not permitted to swer, were:

(a) "What, in your opinion, Mr. Garrett, would be the effect on competition of the elimination of requirement clauses by suppliers generally? I am asking you for your opinion as an expert in the field of marketing of petroleum products and in the light of your training and experience in that field?" [R. 1141.]

(b) ". . . Would the elimination of requirement clauses, Mr. Garrett, by suppliers generally, in your opinion, tend to a substantial increase in company-operated units?" [R. 1141, 1142.]

(c) "Mr. Garrett, in your opinion, would the elimination of requirements contracts by suppliers generally tend to promote the growth of dealer-operated chain of service stations?" [R. 1142.]

(d) "Mr. Garrett, assume that a split-pump system became general; in your opinion, based upon your training and experience, what, if any, would be the change in the overall competitive picture under such split-pump system so far as it relates to suppliers of products to retail outlets?" [R. 1142.]

(e) "Would the elimination of all requirements clauses by suppliers generally increase or decrease the number of existing service stations?" [R. 1142.]

because I have already said that I consider it immaterial for two reasons: first, that this is not a price-fixing case and, in the second place, it appears that the unreasonableness of the restraint under the Sherman Act and the substantiality of the restriction under the Clayton Act are not affected by the price at which the product is sold to the public. . . . .
[R. 1138.]

. . . . . . . . . . . . . .

"I desire to state for the record that I consider the questions propounded to this witness as going to

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(f) "Would the elimination of all requirements clauses by suppliers generally tend to give the more prominent suppliers a competitive advantage?" [R. 1143.]

(g) "From the economic standpoint, Mr Garrett, what can you tell us about the split-pump distribution system as compared with the present single supplier system of distribution in the petroleum marketing field?" [R. 1143.]

(h) "From the economic standpoint does a split-pump distribution system increase the cost of distribution as compared with a single supplier system so far as the dealer is concerned?" [R. 1143.]

(i) "From the economic standpoint does a split-pump distribution system increase the cost of the distribution as compared with a single supplier system so far as the supplier is concerned?" [R. 1143.]

(j) "Is a split-pump system inherently and from the economic standpoint a more expensive system of distribution?" [R. 1143.]

(k) "Assuming that a split-pump system from the economic standpoint would be a more expensive system, in your opinion, would the added expense under a split-pump system be ultimately borne by the purchasing public?" [R. 1144.]

Defendants made no offer of proof, for the questions themselves adequately indicated the materiality of the inquiry. Moreover, early in the trial the District Court had stated: "Do not make an offer of proof. I never accept an offer of proof because it encumbers the record with a lot of things. . . ." [R. 305.]

the economic merits or demerits of the present system as contrasted with a system which prevailed prior to its establishment and which would prevail if the court declared the present arrangement between the supplier, the Standard Oil Company, and the stations governed by dealership contracts or the TBA contracts other than and not including the company-operated stations.

"For the reasons indicated, I consider the inquiry beyond the scope of this lawsuit and entirely immaterial because, if the practice is one forbidden by the Statute, the fact that it may result in economic benefit or its abandonment might result in economic loss is not material under the decisions of the Supreme Court and the Circuit Courts of Appeals, as I read them.

"I will state for the record that I would sustain objections to similar inquiry on the part of any other witnesses that the defendant might produce; and I would sustain objections to any chart or documentary evidence seeking to elicit the facts implied in these questions.

"And I will further state for the record that, because of that, the defendants need not call such witnesses or offer such exhibits or make an offer of proof to cover the facts sought to be elicited through this inquiry.

"What is that old expression? 'Hog-tight, bull-strong, and horse-high,' isn't it, like an old-fashioned fence? I have given you a ruling there that will

allow you to bring up any facet of that question before any court of appeal that this case may reach." [R. 1144. 1145.]

Previous to these admonitions, the District Court in colloquy with counsel had said:

". . . I think that any inducement that the company makes is material, *but any advantages which result to the dealer and indirectly to the public from the arrangement between the company and the dealers is not a proper subject of inquiry, because we are going back again to the question of economic advantage.*" [R. 1088.]

In the face of these explicit admonitions, defendants perforce refrained from further attempt to introduce evidence along this line or evidence concerning the effect on prices of the practices complained of or the economic merits or demerits of such practices.

A question of law which is a proper subject of review is presented when a trial court excludes competent evidence of a material fact. *McCandless v. United States*, 298 U. S. 342. 345 (1936). Subsequent argument herein will show the materiality of the evidence excluded by the District Court.

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### (3) This Conclusion Is Disclosed by the District Court's Failure to Make Findings With Respect to the Competitive Picture and Defendants' Position Therein, Defendants' Purpose, Consumer Demands, and the Characteristics of the Market Generally, Despite Evidence Introduced by the Defendants Upon These Issues and Despite Defendants' Request for a Consideration of These Factors.

The District Court's adoption of an "appreciable segment" of commerce theory resulted in findings of fact which ignored uncontradicted evidence.

The findings substantially ignore the competitive picture and defendants' position therein, defendants' purpose, consumer demands, and the characteristics of the market generally. These were matters put in issue by the fourth and fifth affirmative defenses of defendants' answer [R. 95, 96] as well as by denials of the answer. [R. 88-95.]

The findings deal generally with the making of the contracts and subleases [R. 170-171]; the contents of such contracts and subleases [R. 171-178]; the number of these contracts and subleases outstanding [R. 178]; oral "requirements" contracts and the number thereof [R. 179]; the number of retail outlets operated by independent dealers having contractual relations with Standard [R. 179, 180]; the quantity and dollar volume of business done between defendants and independent dealers [R. 180]; the independent contractor relationship between defendants and independent dealers [R. 181]; the means

and methods pursued by defendants to induce independent dealers to make contracts and subleases [R. 181]; the movement and distribution in interstate commerce of defendants' products [R. 181-183, 185]; and unsuccessful attempts by manufacturers and producers of competing products to sell or to increase their sales to independent dealers having contractual relations with Standard. [R. 184, 185.]

The only reference to the competitive picture and defendants' position therein is the finding [par. 25] that defendant Standard sells between 12% and 14% of all gasoline sold or distributed through independent retail dealer outlets in the Western area;[46] that in a majority of the states in such area Standard is the largest single marketer of gasoline through such outlets; and that Standard during 1946 sold approximately 23% of all gasoline sold in such area. [R. 182.][46] This ignored most of the evidence which defendants introduced as a part of their defense.

Following the publication of the District Court's opinion of June 7, 1948, and before any findings were made, defendants moved that the District Court reopen the cause and hear further argument upon and reconsider its opinion in view of the decision of this Court on June 7, 1948,

[46]See comment on this finding in the opening Statement, pages 25, 26 herein.

in *United States v. Columbia Steel Co.*, 334 U. S. 495. [R. 141, 142.][47]

Supporting this motion for reconsideration defendants filed a printed memorandum pointing out the error of the District Court in predicating its decision upon the limited factors referred to and specifically inviting the District Court's attention to uncontradicted evidence of other facts exhibiting the competitive setting which, under the decision in the *Columbia Steel* case, ought to have been considered. [R. 142-157.]

This motion for reconsideration was denied on June 28, 1948. [R. 168.]

The findings subsequently made, except as above pointed out, ignored facts disclosing the competitive picture and defendants' position therein, defendants' purpose, consumer demands, and the characteristics of the market generally, despite uncontradicted evidence introduced by the defendants upon these matters. They ignored much of the uncontradicted evidence summarized in the opening Statement herein—evidence relating to the number and strength of Standard's competitors, the similar practices employed by such competitors, and their growth and apparent prosperity; Standard's position in the competitive

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[47]This motion was made on the premise that the District Court's opinion of June 7, 1948, did not constitute a judgment and that the District Court retained jurisdiction to reconsider and revise its conclusions stated in such opinion. *Marconi Wireless Co. v. United States*, 320 U. S. 1, 47 (1943); *Continental Nat. Bank v. National City Bank*, 69 F. 2d 312, 317 (C. C. A. 9, 1934; cert. den. 293 U. S. 557); *G. Amsinck & Co. v. Springfield Grocer Co.*, 7 F. 2d 855, 858 (C. C. A. 8, 1925).

picture, Standard's relative position in the competitive field from year to year during the period that the "requirements" contracts have been in use; Standard's practice in supplying dealers without any contract whatever and the dealer's free choice in determining whether he will contract with one of Standard's competitors or with Standard, and if the latter, the form of contract he will sign; the origin and long use of "requirements" contracts; the general adoption of a single-supplier system of gasoline distribution in the Western area by a multitude of dealers handling the products of Standard's competitors; Standard's practice of avoiding a concentration of dealers in one locality; Standard's failure to have contracts with the dealers occupying "favorably situated" retail outlets; the benefit in cost to both the dealer and the public from the use of the "requirements" contracts; and the danger of substitution from any return to a "split-pump" regime.[48]

When a trial court neglects to find a fact material to a determination of the cause, such neglect is equivalent to a ruling that such fact is immaterial. This presents a question of law which is a proper subject of review. *The Francis Wright*, 105 U. S. 381, 387 (1881); *The E. A. Packer*, 140 U. S. 360, 364 (1891); *The City of New York*, 147 U. S. 72, 77 (1893). Subsequent argument herein will show the materiality of the facts ignored by the District Court's findings.

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[48]See our subsequent argument, page 110 herein, with reference to the District Court's failure to find facts requisite to show illegality.

## II.

## THE DISTRICT COURT ERRED IN DISREGARDING COMPETITIVE AND ECONOMIC FACTORS. THESE FACTORS SHOULD HAVE BEEN CONSIDERED AND WEIGHED.

As already pointed out, the District Court excluded evidence as to what would ensue from an elimination of the "requirements" contracts, and also disregarded a great deal of the evidence which was received showing the competitive and economic background. This was error.[49]

Defendants were entitled to have the District Court, the trier of fact, consider and weigh all of this evidence, *i. e.*, consider and weigh the competitive and economic factors, such as "the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market."[50] If these factors, which were brushed aside as inconsequential, had been considered and weighed, can anyone say that the result would not have been different? We contend that these factors required a different decision.

[49]Error is specifically assigned. [R. 1872-1875, 1867.]

[50]*United States v. Columbia Steel Co.*, 334 U. S. 495, 527 (1948).

## (1) Presence or Absence of Prejudice to the Public Interest Was the Test Which the District Court Should Have Employed, Both Under the Sherman Act and the Clayton Act.

### (A) THIS WAS THE PROPER TEST UNDER THE SHERMAN ACT.

Sec. 1 of the Sherman Act makes unlawful contracts in *unreasonable*[51] restraint of trade.

To determine whether alleged restraint is unreasonable or reasonable, the test is presence or absence of prejudice to the public interest.

In *Nash v. United States*, 229 U. S. 373, Mr. Justice Holmes, speaking of the *Standard Oil* and *American Tobacco* cases, said (p. 376):

> "Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, *prejudice the public interests* by unduly restricting competition or unduly obstructing the course of trade."[52]

### (B) THIS WAS THE PROPER TEST UNDER THE CLAYTON ACT.

Sec. 3 of the Clayton Act makes it unlawful for any person to make a contract for the sale of goods "on the condition, agreement, or understanding" that the purchaser "shall not use or deal in the goods . . . of a competi-

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[51] *Standard Oil Co. v. United States*, 221 U. S. 1, 60 (1911); *American Tobacco Co. v. United States*, 221 U. S. 106, 179 (1911).

[52] This statement of this rule has been cited with approval in: *Thomsen v. Cayser*, 243 U. S. 66, 85 (1917); *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 360 (1933); and *Sugar Institute v. United States*, 297 U. S. 553, 597 (1936).

tor" where the effect of such contract may be "*to substantially lessen competition or tend to create a monopoly in any line of commerce.*"

As already pointed out, *presence or absence of prejudice to the public interest* is the test which will be applied under the Sherman Act in determining whether or not there has been an *unreasonable* restraint.

The same thing is true under the Clayton Act. The same test—*presence or absence of prejudice to the public interest*—must be applied under sec. 3 of that Act in determining whether the effect of the contracts attacked may be to *substantially lessen competition or tend to create monopoly.*

Thus, in *International Shoe Co. v. Comm'n.*, 280 U. S. 291, dealing with sec. 7 of the Clayton Act (38 Stat. 731; 15 U. S. C. sec. 18), which uses the same language found in sec. 3, *i. e.* forbids certain stock acquisitions where the effect "*may be to substantially lessen competition . . . or tend to create a monopoly* of any line of commerce," this Court said (p. 298):

"In *Standard Oil Co. v. Federal Trade Commission*, 282 Fed. 81, 87,[53] the Court of Appeals for the Third

[53] In *Standard Oil Co. v. Federal Trade Commission*, 282 Fed. 81 (C. C. A. 3, 1922, affirmed 261 U. S. 463), it was said (p. 87): "Therefore in determining whether given acts amount to unfair methods of competition within the meaning of the Federal Trade Commission Act, or *substantially lessen competition* and tend to create a monopoly within the meaning of the Clayton Act, *the only standard of legality with which we are acquainted is the standard established by the Sherman Act in the words 'restraint of trade or commerce' and 'monopolize, or attempt to monopolize,' and by the courts in construing the Sherman Act, with reference to acts 'which operate to the prejudice of the public interest* by unduly restricting competition or unduly obstructing the due course of trade,' and 'restrict the common liberty to engage therein.'"

Circuit applied the test to the Clayton Act which had theretofore been held applicable to the Sherman Act, namely, that *the standard of legality was the absence or presence of prejudice to the public interest* by unduly restricting competition or unduly obstructing the due course of trade. In *Federal Trade Comm'n v. Sinclair Co.*, 261 U. S. 463, 476, referring to the Clayton Act and the Federal Trade Commission Act, this Court said:

"'The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain.'

"Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as *probably* will result in lessening competition to a substantial degree, *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 357; that is to say, *to such a degree as will injuriously affect the public.*"

Presence or absence of prejudice to the public interest *must be the test*—otherwise a multitude of contracts must be condemned. In a sense every contract to sell lessens competition, and in many cases such contract lessens a great deal of competition. This is true, because the making of any contract to sell removes the articles contracted to be sold from competition. The contract buyer will not, after such contract is concluded, buy such articles from anyone but the contract seller. Competition with respect to such articles is at an end. Implicit in the contract to purchase is an "understanding" that the buyer under such contract will not deal with a competitor of the seller for that particular quantity of goods. Thus this Court has said that "every agreement concerning trade . . . re-

strains." (*Chicago Board of Trade v. United States*, 246 U. S. 231, 238; repeated in *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 361); that "every exclusive arrangement in the business or commercial field may produce a restraint of trade" (concurring opinion of Mr. Justice Douglas in *Associated Press v. United States*, 326 U. S. 1, 23).[54] For example, suppose that manufacturers A and B are competing with one another for the patronage of C, a prospective buyer of their products. A succeeds in inducing C to contract to purchase from A a substantial quantity of A's products which C thinks he will need over a certain period or for a certain purpose. The conclusion of this contract elimiates B's chances for the time being of selling his products to C. *This is true, whether A's contract calls for the supplying of C's "requirements" or for the supplying of a definite quantity.* The "understanding" between A and C as a result of A's contract is

[54]As pointedly expressed by Circuit Judge Sanborn in *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 462 (C. C. A. 8, 1903): "*An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases—dies. Every person engaged in interstate commerce necessarily attempts to draw to himself, and to exclude others from, a part of that trade; and, if he may not do this, he may not compete with his rivals, all other persons and corporations must cease to secure for themselves any part of the commerce among the states, and some single corporation or person must be permitted to receive and control it all in one huge monopoly.* The purpose of the act of July 2, 1890, was, however, to prevent the stifling of competition, not to destroy it or to foster monopoly, and any construction of any of its provisions which would give it such an effect is unreasonable and inconsistent with the object and spirit of the law."

To the same effect, see *United States v. Standard Oil Co. of New Jersey*, 47 F. 2d 288, 297 (Mo. 1931).

certainly that C will purchase from A, and not from B, the competitor, the products called for by such contract. During the life of A's contract, B's "competition" for this business is no longer a factor. During that period B is "shut-away" from that part of his potential market represented by A's business with C.

But every contract to buy and sell goods in commerce, even though such contract involves a very large quantity, *i. e.*, is "substantial" in the quantitative sense, cannot be a violation of sec. 3. "*Substantially lessen competition*" cannot be given a mere quantitative meaning. It cannot be determined (as the District Court assumed to determine it) solely from a consideration of the number of Standard's contracts and the dollar volume of products handled thereunder. Something more—*injury to the public interest*—must be shown before the contract can be condemned as coming within the words "*substantially lessen competition.*" *These words require the application of a "rule of reason"* analogous to the rule under sec. 1 of the Sherman Act. "The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it." (*Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 360.) As said by Circuit Judge Kimbrough Stone, speaking for a three-judge court: "It is only when this lessening [of competition] is with an unlawful purpose or by unlawful means, or *when it proceeds to the point where it is or is threatening to become a menace to the public*, that it is declared unlawful *The point of danger is reached when monopoly is threat-*

ened." (*United States v. Standard Oil Co. of New Jersey*, 47 F. 2d 288, 297.)

Sec. 3 of the Clayton Act, referring to "competition" uses the words "substantially *lessen*." What is a substantial *lessening* of competition in the light of the purposes which the Act sought to accomplish? As already pointed out, competition in a sense is lessened when A, competing with B for the patronage of C, succeeds in concluding a contract with C for a future supply of A's products, and if such contract embraces large quantities then, in a quantitative sense, there is a "substantial" lessening of competition. But this could not have been the sense contemplated by Congress, for if so, a multitude of contracts in every branch of commerce and industry must be condemned. The rule of reason to be applied here is the rule announced in the *International Shoe Co.* case, *supra*, viz., *injury to the public interest*. Tested by this rule, the lessening of competition condemned must be—not a lessening of competition arising merely from success in contracting for the future disposal of a supply of goods, but a lessening of competition in the sense that competitors are eliminated by means which are unfair and thus work an injury to the public interest.[55]

[55] *Federal Trade Comm'n. v. Morton Salt Co.*, 334 U. S. 37 (1948) arose under sec. 2 of the Clayton Act as amended by the Robinson-Patman Act. That section forbids price discriminations where their effect "may be substantially to lessen competition or tend to create a monopoly . . . *or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination*, or with customers of either of them . . ." The first part of this is like sec. 3 of

This "rule of reason" in the interpretation of sec. 3 was applied in *B. S. Pearsall Butter Co. v. Federal Trade Commission*, 292 Fed. 720 (C. C. A. 7).[56] There a complaint against petitioner before the Commission charged a violation of sec. 3 of the Clayton Act. Petitioner was a manufacturer of margarine products. Such products were also manufactured by other companies. Petitioner's contracts provided that dealers handling petitioner's products *should handle its products exclusively in a given territory* during the life of such contracts. About twenty other manufacturers of margarine products used a contract like that of petitioner, by which the dealer agreed to wholesale the manufacturer's brands of margarine exclusively in a

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the Clayton Act with which we are here concerned. The italicized part has no counterpart in sec. 3." In this *Morton Salt* case it was unnecessary for the Court to determine the meaning of "substantially to lessen competition or tend to create a monopoly." The case was controlled by the italicized language. Thus, the Court remarked in a footnote at p. 47 of the opinion: "The statute outlaws any discrimination the effect of which 'may be substantially to lessen competition . . . or to injure . . . competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .'" and in its opinion the Court said (p. 46): "Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay. . . . (p. 47) . . . "That respondent's quantity discounts did result in price differentials between competing purchasers sufficient in amount to influence their resale prices of salt was shown by evidence." So the ruling in this case was against Morton because the discriminations *injured competition* between merchants some of whom received the benefit of such discriminations.

[56] This case has been cited with approval in *Lipson v. Socony-Vacuum Corp.*, 76 F. 2d 213, 218 (C. C. A. 1, 1935), and *Boro Hall Corp. v. General Motors Corp.*, 130 F. 2d 196, 197 (C. C. A. 2, 1942; cert. den. 317 U. S. 695).

given territory, and most of the rest of the manufacturers had some kind of understanding for exclusive representation with the various jobbers handling their products. This case on its facts closely resembles our case. The Circuit Court held that there was no violation of the Act.[57]

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[57] The Circuit Court said (pp. 722, 723):

"There does not appear to be anything distinctive about its product—nothing which could not readily be supplied by many other makers of this apparently standardized product. Petitioner does not occupy 'a dominant position' in that line of commerce, as was the case in United Shoe Mach. Co. v. United States, 258 U. S. 451, 42 Sup. Ct. 363, 66 L. Ed. 708. And it cannot be here said, as in the last-named case, that to its customer its particular product may be absolutely essential to the prosecution and success of his business.'

"It is interesting here to note that it was only five years previous that petitioner entered into this doubtless then well standardized business, in competition with many others, most of whom have arrangements with their jobbers more or less similar, and that in the face of this competition, in such brief time built up a business of about 4,000,000 pounds for its last year. From this it may well appear that the similar practice by others in the same class did not result in stifling of competition and monopolizing the trade to the substantial or serious detriment of this recent entrant therein. Nothing here appears to indicate that the ultimate distributor of the product, the retailer, is in any way bound or restricted. He is generally familiar with the market, and with the ways and means of transportation of commodities, and if he desires in his business to handle the product of other makers he is at liberty to procure it—from the maker himself or from those who handle it.

"Most of the witnesses unite in saying that in the handling of this product there is advantage to manufacturer, jobber, retailer, and the public in having a particular brand handled exclusively by one jobber in a given locality wherein he handles no other similar product, and while one or two did say, on being examined as to the result of such a contract, that it might restrict competition, it is evident that they meant no more than that the employment of such contracts might in some circumstances so result. Under the particular facts which this record discloses, it is our view that the contract in question, as employed by this petitioner, does not fall under the condemnation of section 3 of the Clayton Act."

### (2) This Was Not a Case Which Could Properly Be Decided Solely by Resort to an "Appreciable Segment" of Commerce Theory.

The District Court decided this case solely upon an "appreciable segment" of commerce theory. It said:

> "Substantiality of restraint or tendency to create monopoly *is established* by (a) the market foreclosed,—here represented by the controlled units,—and (b) the volume of controlled business, totaling here in value $68,000,000.00. [R. 126.]
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> ". . . as I read the latest cases of the Supreme Court, *I am compelled to find* the practices here involved to be violative of both statutes. For they affect injuriously a sizeable part of interstate commerce, or,—to use the current phrase—'an *appreciable segment*' of interstate commerce." [R. 130.]

To support this "appreciable segment" of commerce theory, *United States v. Yellow Cab Co.*, 332 U. S. 218, was relied upon. [R. 119, 120.] There it was said (pp. 225, 226) that the Act "outlaws *unreasonable* restraints on interstate commerce, regardless of the amount of the commerce affected. . . . Hence it is enough if some *appreciable part* of interstate commerce is the subject of a monopoly, a restraint or a conspiracy. . . . Its [CCM's] relative position in the field of cab production has no necessary relation to the ability of the appellees to conspire to monopolize or restrain . . . an *appreciable segment* of interstate cab sales."

But this does not say that "unreasonableness" is established *solely* by finding that an appreciable or even a sizeable part of commerce is affected. The "unreasonable-

ness" of the restraint must first be determined. This being determined, the case is brought within the power to regulate interstate commerce and hence within the Act by a finding that an "appreciable segment" of interstate commerce is affected by such unreasonable restraint.

The District Court in our case erred in making the fact that an "appreciable segment" of commerce was affected, the *sole test* of reasonableness.[58]

If it be true, as this Court has said, that "every agreement concerning trade . . . restrains" (*Chicago Board of Trade v. United States*, 246 U. S. 231, 238; repeated in *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 361),[59] then the rule followed by the District Court would make every sales contract illegal under the Act, provided such contract affected an "appreciable segment" of commerce. The repercussions of such a rule would be infinite.

The error of the District Court is demonstrated by the opinion of this Court in *United States v. Columbia Steel Co.*, 334 U. S. 495. There it was pointed out that

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[58]Error is specifically assigned. [R. 1867.]

[59]See also the concurring opinion of Mr. Justice Douglas in *Associated Press v. United States*, 326 U. S. 1 (1945), where it was said (p. 23):

"Every exclusive arrangement in the business or commercial field may produce a restraint of trade. A manufacturer who has only one retail outlet for his product may be said to restrain trade in the sense that other retailers are prevented from dealing in the commodity. . . . But *Standard Oil Co. v. United States*, 221 U. S. 1, construed the Sherman Act to include not every restraint but only those which were unreasonable."

if the restraint is "illegal *per se*" or there is a "specific intent to accomplish a forbidden restraint," this is enough to stamp the restraint as unreasonable, in which case the Act is violated if an "appreciable segment" of commerce is affected. There it was pointed out that in the *Yellow Cab* case (since such case went up following the granting of a motion to dismiss) the Court accepted as true the complaint's allegation that defendants had combined and conspired to restrain with the intent and purpose of monopolizing; thus in the *Yellow Cab* case there was clearly an unreasonable restraint, and all that was necessary to bring the case within the Act was to show that an "appreciable segment" of commerce was affected. This Court said (p. 521):

> "We do not construe our holding in the *Yellow Cab* case to make illegal the acquisition by United States Steel of this outlet for its rolled steel without consideration of its effect on the opportunities of other competitor producers to market their rolled steel.

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(p. 522):

> "*In the complaint* [in the *Yellow Cab* case] *the government charged that the defendants had combined and conspired to effect the restraints in question with the intent and purpose of monopolizing the cab business in certain cities, and on motion to dismiss that allegation was accepted as true.* Where a complaint charges such an unreasonable restraint as the facts of the *Yellow Cab* case show, the amount

of interstate trade affected is immaterial in determining whether a violation of the Sherman Act has been charged. *A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal per se.* For example, where a complaint charges that the defendants have engaged in price fixing,[60] or have concertedly refused to deal with non-members of an association,[61] or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device,[62] then the amount of commerce involved is immaterial because such restraints are illegal *per se.* *Nothing in the Yellow Cab case supports the theory that all exclusive dealing arrangements are illegal per se.*

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(p. 524):

"*Exclusive dealings* for rolled steel between Consolidated and United States Steel, *brought about by vertical integration or otherwise, are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product.*

[60]Citing *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150.

[61]Citing *Associated Press v. United States*, 326 U. S. 1; *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600; *Montague & Co. v. Lowry*, 193 U. S. 38. See *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U. S. 457.

[62]Citing *International Salt Co. v. United States*, 332 U. S. 392.

"In *United States v. Paramount Pictures*, 334 U. S. 131, we were presented with a situation in which the government charged that vertical integration was illegal under the Sherman Act. We held that control by the major producer-distributors over nearly three-quarters of the first-run theaters in cities with population over 100,000 was not of itself illegal, and we remanded the case to the district court for further findings. In outlining the factors which we considered to be significant in determining the legality of vertical integration, we emphasized the importance of characterizing the nature of the market to be served, and the leverage on the market which the particular vertical integration creates or makes possible. A second test which we considered important in the *Paramount* case was the purpose or intent with which the combination was conceived. When a combination through its actual operation results in an unreasonable restraint, intent or purpose may be inferred; even though no unreasonable restraint may be achieved, nevertheless a finding of specific intent to accomplish such an unreasonable restraint may render the actor liable under the Sherman Act."

Where there is neither a restraint "illegal *per se*" nor a "specific intent to accomplish a forbidden restraint," there must be proof that the restraint is unreaonable *and such proof must amount to something more than a showing that an "appreciable" or even a sizeable segment of commerce is affected.* Certainly in the *Columbia Steel* case an "appreciable" segment of commerce was affected. The

Steel Company obtained for all time to come the exclusive patronage of a Pacific Coast company (p. 523) whose purchases amounted to over $5,000,000.00 annually (p. 537). Yet despite the fact that an "appreciable" segment of commerce was affected, the transaction was upheld because proof of unreasonableness was lacking. The same thing must be true in our case. As in the *Columbia Steel* case, so in our case, there was neither (a) a restraint "illegal *per se*," nor (b) a "specific intent to accomplish a forbidden restraint." Therefore the fact alone that an "appreciable" or even a sizeable segment of commerce was affected was not enough to spell illegality.

## (A) IN OUR CASE THERE WAS NO RESTRAINT WHICH WAS "ILLEGAL PER SE."

In our case there was:

(a) No conspiracy or combination.

(b) No price fixing or price control or price discrimination or attempt at anything of that sort, as in *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150.

(c) No concerted refusal to deal with non-members of an association, or boycott, as in *Associated Press v. United States*, 326 U. S. 1; *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U. S. 600; *Montague & Co. v. Lowry*, 193 U. S. 38; or *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U. S. 457.

(d) No contract provision tying an obligation to purchase an unpatented article to the obligation to purchase a patented article as in *International Salt Company v. United States*, 332 U. S. 292.

(e) No monopoly or monopoly power as in *American Tobacco Co. v. United States*, 328 U. S. 781; *United States v. Griffith*, 334 U. S. 100; or *Schine Theatres v. United States*, 334 U. S. 110.

In our case the government was attacking a type of contract which has been in common use for generations, which serves a beneficial purpose, and has been held to be intrinsically legal and sanctioned by public policy.[63] Con-

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[63] *Pick Mfg. Co. v. General Motors Corp.*, 299 U. S. 3 (1936); *Federal Trade Commission v. Sinclair Co.*, 261 U. S. 463 (1923); *Twin City Co. v. Harding Glass Co.*, 283 U. S. 353 (1931); *Wilder Mfg. Co. v. Corn Products Ref. Co.*, 236 U. S. 165 (1915); *Restatement of Contracts*, sec. 516.

A "requirements" contract involving raw product *for one-third of the pink-tinted eyeglass lenses sold in the United States* was upheld under the Sherman Act in *United States v. Bausch & Lomb Co.*, 45 Fed. Supp. 387 (N. Y. 1942), and this holding was affirmed by an equally divided Court in 321 U. S. 707, 719. By this contract Soft-Lite, a national distributor of one-third of all pink-tinted lenses agreed with Bausch & Lomb, a manufacturer, to buy all its requirements of pink-tinted glass from Bausch & Lomb, and the latter agreed not to sell any of such glass to others.

Petroleum products contracts with retail gasoline dealers like those here involved have been held *not* to be in restraint of trade: *Associated Oil Co. v. Myers*, 217 Cal. 297, 18 P. 2d 668 (1933); *Cantrell v. Knight* (Mo. App.), 72 S. W. 196 (1934); *Quincy Oil Co. v. Sylvester*, 238 Mass. 95, 130 N. E. 217 (1921); *Cox, Inc. v. Humble Oil Refining Co.* (Tex. Com. App.), 16 S. W. 2d 285 (1929); *Wiseman v. Dennis*, 156 Va. 431, 157 S. W. 716 (1931); *McQuaig v. Seaboard Oil Co.*, 96 Fla. 275, 118 So. 424 (1928).

The widespread use of "requirements" contracts as a reasonable business practice is demonstrated by the numerous cases before the courts in which such contracts have been interpreted and enforced. Typical of such cases are the following: *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp.*, 130 F. 2d 471 (C. C. A. 3, 1942) (5-year requirements of paper boxes); *United States v. Purcell Envelope Co.*, 249 U. S. 313 (1919) (4-year require-

tracts by which one party agrees to buy all of his "requirements" of a given commodity from a single supplier have been a familiar feature of industrial and commercial dealings for many years. The Federal government appar-

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ments of envelopes for post office department); *Crane Ice Cream Co. v. Terminal etc. Co.*, 147 Md. 588, 128 Atl. 280 (1925) (3-year requirements of ice); *Dowd v. Hercules Powder Co.*, 66 Colo. 302, 181 Pac. 767 (1919) (2-year requirements of blasting powder); *Washington Chocolate Co. v. Canterbury Candy Makers*, 18 Wash. 2d 79, 138 P. 2d 195 (1945) (5-year requirements of chocolate); *Knowles Foundry Co. v. National Plate Glass Co.*, 301 Ill. App. 128, 21 N. E. 2d 913 (1939) (2-year requirements of runner bars for manufacture of plate glass); *Goldschmidt & Loewenick Inc. v. Diamond State Fibre Co.*, 186 App. Div. 688, 174 N. Y. S. 800 (1919), *appeal dismissed* 230 N. Y. 621 (1921) (1 year and 3½ months requirements of fibre); *Northern Iowa Gas & Electric Co. v. Luverne*, 257 Fed. 818 (Iowa, 1919) (20-year requirements of electricity); *Medder v. Town of Sibley*, 143 Wis. 545, 128 N. W. 72 (1924) (20-year requirements of electricity); *Montgomery Traction Co. v. Montgomery Light & Power Co.*, 229 Fed. 672 (C. C. A. 5, 1916) (15-year requirements of electricity); *Southwest Natural Gas Co. v. Oklahoma Portland Cement Co.*, 102 F. 2d 630 (C. C. A. 10, 1939) (15-year requirements of natural gas); *Potts v. Mathieson Alkali Works*, 165 Va. 196, 181 S. E. 521 (1935) (10-year requirements of coal); *Elk Refining Co. v. Falling Rock Cannel Coal Co.*, 92 W. Va. 479, 115 S. E. 431 (1922) (10-year requirements of natural gas); *City of Holton v. Kansas City Power & Light Co.*, 135 Kan. 58, 9 P. 2d 675 (1932) (10-year requirements of electricity); *Helena, etc. R. R. Co. v. Northern Pacific R. Co.*, 57 Mont. 93, 186 Pac. 702 (1920) (5-year requirements of electricity); *Griffin v. Oklahoma Natural Gas Corp.*, 37 F. 2d 545 (C. C. A. 10, 1930) (5-year requirements of natural gas); *Boehme & Rauch Co. v. Lorimer*, 221 Mich. 372, 191 N. W. 8 (1922) (4 years, 9½ months requirements of coal); *Butler Exchange Co. v. Fess Rotary Oil Burner Co.*, 125 Atl. 360 (R. I. Supreme Ct., 1924) (3 years, 8 months requirements of fuel oil); *A. W. Hinkel Dry Goods Co. v. Wichison Natural Gas Co.*, 64 F. 2d 881 (C. C. A. 10, 1933) (3-year requirements of natural gas); *Willapa Elec. Co. v. Dunns Construction Co.*, 168 Wash. 416, 12 P. 2d 609 (1932) (3-year requirements of electricity); *Jackson Hill Coal & Coke Co. v. Merchant's H. & L. Co.*, 193 Ind. 422, 140 N. E. 532 (1923) (2-year requirements of coal); *Dockson Gas Co. v. S. & W. Constr. Co.*, 12 So. 2d 847 (1943) (2 seasons requirements of gas); *In re United Cigar Stores*, 8 Fed. Supp. 243, 72 F. 2d 673 (C. C. A. 2, 1934) (10-year requirements of ice cream); *McMichael v. Price*, 177 Okla. 186, 58 P. 2d 549 (1936) (10-year requirements of sand).

ently uses "requirements" contracts.[64] They serve a beneficial purpose in assuring an adequate supply to meet future needs, where over the future such needs will be variable and unpredictable. *This is peculiarly true of a retail gasoline dealer.* He must have the present assurance of an adequate future supply. Yet he cannot predict with certainty what he will require over a future period, and he does not have storage space for a supply which will satisfy future needs for more than a few days.

During the trial the District Court stated that in its opinion the "requirements" contracts were not *per se* illegal; that their legality or illegality under the antitrust laws could be ascertained only by examining their effect upon commerce. [R. 840, 846, 847.] There was no finding that the "requirements" contracts were "illegal *per se*," and this was not stated as one of the District Court's conclusions of law.

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[64] See U. S. Standard Form No. 32 (Revised) and General Conditions, Revised October 7, 1946, Treasury Department Procurement Division. In these General Conditions the following is prescribed as one of the conditions of a regular supply contract:

" '3. Scope of Contract. Supplies will be ordered from time to time in such quantities as may be needed. *As it is impossible to determine the precise quantities of different kinds of articles and materials described in the Specifications and Proposals for Supplies that will be required during the contract term, each bidder whose bid is accepted will be obligated to deliver all supplies of the kind contracted for that may be ordered during the contract term.* The statements as to money value of previously reported annual purchases are given for information only, *and will not relieve the agencies and activities* (as noted in the specifications) of the United States and District of Columbia Governments, *for the use of which the contract is made, of the obligation to order from the contractor all articles or services covered by the contract that may, in the judgment of the ordering officers, be needed; and shall not relieve the contractor of his obligation to fill all such orders.*" (C. C. H. Government Contracts Reporter, Vol. 1, par. 18,321.)

If, as pointed out by this Court (*United States v. Columbia Steel Co.*, 334 U. S. 495, 523, 524, 527; *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 173, 174), exclusive dealing brought about through *"vertical integration"* is not illegal *per se*, the same thing must be true in our case where exclusive dealing is alleged to have been brought about by *"requirements" contracts*. Exclusive dealing brought about by "vertical integration" is *permanent*; exclusive dealing brought about through "requirements" contracts lasts only during the *limited period* that such contracts can be enforced by the supplier.

**(B) IN OUR CASE THERE WAS NO "SPECIFIC INTENT TO ACCOMPLISH A FORBIDDEN RESTRAINT."**

The only finding concerning "intent" is that the "intent, purpose and effect of the exclusive supply provisions" have been "to prevent the 'independent dealer' operating under said agreements from handling any 'petroleum products,' tires, tubes, batteries and miscellaneous accessories other than those supplied or sponsored by defendants"; that the agreements "are intended to and in practice do confine the independent dealers to defendants' petroleum products and automotive accessories . . . ." [R. 185.]

As long as a "requirements" contract is in force and the dealer faithfully performs the contract by buying his "requirements" from Standard, the dealer will not buy what he requires from a third party to supply the location referred to in the contract. Therefore, when this finding says that the purpose and intent of the exclusive supply provisions has been to prevent the dealers from handling the products of other suppliers, it merely declares an intent which is obvious from the language of the contracts.

But this is simply to declare an intent which would exist in the case of any contract for the sale of goods. Any such contract is *intended to prevent* the buyer from handling the products of other suppliers to the extent that his "requirements" are thus contracted for.

It is one thing to say (as this finding says) that Standard when it made these contracts *intended* to prevent the contracting dealers from buying their "requirements" from anyone but Standard. It would be quite a different thing to say (and this finding does not say) that Standard made these contracts with the *intent* or *purpose* of gaining control over a market or driving out or suppressing competition, or doing any other act forbidden by the anti-trust laws.

If what a defendant does, *without more*, is the result condemned by the Act, then such defendant is deemed to have had a specific intent to violate the Act, for he is deemed to have intended the "necessary and direct consequence of what he did." (*United States v. Griffith*, 334 U. S. at 108.) Here what Standard did was to make certain contracts. The only finding as to Standard's purpose or intent is that it intended these contracts to do what on their face they purport to do, *i. e.*, obligate the dealer to buy his "requirements" for a given location from Standard. But the making of these contracts without more was not a result condemned by the Act. As said in the *Columbia Steel* case (334 U. S. at 524): "*Exclusive dealings . . . brought about by vertical integration or otherwise, are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product.*" There is no finding and no evidence that the effect of what Standard

did was to unreasonably restrict the opportunities of competitors to market their product.

Beyond doubt U. S. Steel's intent in acquiring Consolidated Steel in the *Columbia Steel* case was to prevent U. S. Steel's competitors from thereafter selling their products to Consolidated and to confine Consolidated to the purchase of U. S. Steel's products. As said therein (334 U. S. 495, at 523): "A subsidiary will in all probability deal only with its parent for the goods the parent can furnish." Yet this intent of U. S. Steel was held not to be an intent to accomplish a forbidden restraint.

The "intent" required to spell illegality is referred to in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, in which, as in the *Columbia Steel* case, this Court pointed out that "vertical integration" was not "illegal *per se*." This Court said (pp. 173, 174):

> "Exploration of these phases of the cases would not be necessary if, as the Department of Justice argues, vertical integration of producing, distributing and exhibiting motion pictures is illegal *per se*. But the majority of the Court does not take that view. In the opinion of the majority the legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent. First, it runs afoul of the Sherman Act if it was a *calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs. United States v. Reading Co.*, 253 U. S. 26, 57; *United States v. Lehigh Valley R. Co.*, 254 U. S. 255, 269-270. Second, a vertically integrated enterprise, like other aggregations of business units (*United States v. Aluminum*

> *Co. of America*, 148 F. 2d 416), will constitute monopoly which, though unexercised, violates the Sherman Act provided a power to exclude competition is coupled with a purpose or intent to do so."

In our case there was neither finding nor evidence that Standard's practice of employing "requirements" contracts was conceived as a *"calculated scheme to gain control"* or *"to restrain or suppress competition, rather than an expansion to meet legitimate business needs,"* or that there was any monopoly contemplated or achieved, or that there was any "power to exclude competition . . . coupled with a purpose or intent so to do." The evidence was all to the contrary.

The evidence shows that in the Western area the uniform practice, not only of dealers in Standard's products, but of *all retail gasoline dealers*, was to handle the gasoline of a single supplier. "Split-pump" stations (*i. e.* stations handling the gasoline of more than one supplier) represent only 1.6% of the total retail outlets in that area. [R. 1062, 1763-1777, 1064.] Compelling reasons for the growth of this practice of single-line handling were the dealers' own preference, the danger of substitution and the added cost of serving "split-pump" accounts (see page 16, and footnote 17 herein).

This evidence showing the reasons for single-line handling was uncontradicted. These reasons disclose the intent which prompted the use of "requirements" contracts. They were legitimate business reasons. There was no evidence showing any other reason for the adoption of "requirements" contracts. Certainly there was no evidence showing that their use came about as a result of an intent to gain control of the market or to restrain or suppress competition. Nor was there any finding of fact to that effect.

### (3) Applying the Test of Presence or Absence of Prejudice to the Public Interest, the District Court Should Have Considered and Weighed the Competitive and Economic Factors Which It Disregarded.

Consider first the uncontradicted evidence dealing with competitive and economic factors which was received but disregarded by the District Court.

This evidence was material on the issue of the "reasonableness" of the alleged restraint, and the issue whether the effect of the contracts was to substantially lessen competition or tend to create monopoly.

In a case of this character, where there is neither a restraint "illegal *per se*," nor an "intent to accomplish a forbidden restraint," a factual inquiry of broad scope is required—an inquiry in which the government has the burden of making *"a definite factual showing of illegality."*[65]

The breadth of this factual inquiry is emphasized in *Chicago Board of Trade v. United States*, 246 U. S. 231, 238:

> "But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. *Every agreement concerning trade, every regulation of trade, restrains.* To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. *To determine that*

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[65] *Standard Oil Co. v. United States*, 283 U. S. 163, 179 (1931); *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 377 (1933).

*question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."*

This was followed in *Appalachian Coals, Inc. v. United States*, 288 U. S. 344 (1933), wherein it was said (p. 361):

> "The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. *It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal.*"

The importance of this factual inquiry—as distinguished from a solution of the case solely upon an "appreciable segment" of commerce theory—is pointed out in *United States v. Columbia Steel Co.*, 334 U. S. 495. There, as already pointed out, this Court declared (p. 523) that "nothing in the *Yellow Cab* case supports the theory that all exclusive dealing arrangements are illegal *per se*," and (p. 524):

> "The legality of the acquisition by United States Steel of a market outlet for its rolled steel through the purchase of the manufacturing facilities of Con-

solidated depends not merely upon the fact of that acquired control *but also upon many other factors. Exclusive dealings* for rolled steel between Consolidated and United States Steel, brought about, by vertical integration or otherwise, *are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product.*"

So in our case, legality of the "exclusive dealings" depends "*not merely upon the fact of . . . acquired control, but also upon many other factors,*" which the District Court disregarded. "Exclusive dealings" brought about by the "requirements" contracts *are* "*not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product.*" No such unreasonable restriction was shown.

Concerning the factual inquiry which must be undertaken, this Court in the *Columbia Steel* case said (p. 527):

> "*In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market.*"[66]

*These were the very factors which in our case the District Court disregarded.* The District Court in deciding our case should *not* have determined that illegality *is established*" by the number of "controlled units" and the

[66] This appears in that part of the opinion which discusses *horizontal* integration, but the Court stated on the same page that the same considerations apply also to *vertical* integration.

"volume of controlled business." [R. 126.] It should not have inspected Standard's operations in a vacuum. It should have considered *and weighed* the factors emphasized in the above quoted opinion. If these factors were material in the *Columbia Steel* case, surely they were material in our case. In the *Columbia Steel* case the alleged "control" arose from "vertical integration" and was permanent. In our case the alleged "control" arises from "requirements" contracts and lasts only during the limited period that such contracts can be enforced by the supplier.

The District Court's failure to consider and weigh these factors was error.[67]

Consider next the line of inquiry which the District Court excluded.

The evidence so excluded was material on the issue of the "reasonableness" of the alleged restraint and the issue whether the effect of the contracts was to substantially lessen competition or tend to create monopoly.

The evidence so excluded was offered by defendants to show the effect on competition and on the number of existing service stations of the elimination of the "requirements" clauses as well as the changes which would occur in the over-all competitive picture, the cost of distribution, and the effect on dealers and the public, if, as a result of such elimination, a "split-pump" system became general. [R. 1141-1144.] The District Court went further. It stated that it would not "allow any testimony regarding the *effect of this arrangment* [*i.e.* the "requirements" contracts] *on prices*" [R. 1138]; that the "fact that it [*i. e.* the practice employing these contracts] may result in

[67]Error is specifically assigned. [R. 1867.]

economic benefit or its abandonment might result in eco nomic loss is not material under the decisions of the Supreme Court . . ." [R. 1144.] The District Court had stated previously that "any advantages . . . to the dealer and indirectly to the public from the arrangement . . . is not a proper subject of inquiry, . . ." [R. 1088.]

Certainly application of the prejudice to the public interest test required consideration of the evidence which the District Court excluded—evidence as to the "effect on competition of the elimination of the 'requirements' clauses"; evidence that what the government was seeking to accomplish would actually result in elimination of competition by an increase in company-operated service stations and the promotion of dealer-operated chains of service stations; evidence as to how the elimination of the "requirements" clauses would affect "the over-all competitive picture" and whether this would mean an increase or decrease in the number of existing service stations or "give the more prominent suppliers a competitive advantage"; and evidence as to the economic aspects of the "split-pump" distribution system as compared with the prevailing single-supplier system, the cost of one as compared with the other, and the additional economic burden to be borne by the public if the former system supplanted the present system.

Of course the District Court's exclusion of this evidence was consistent with its view that the government was entitled to a decree *solely* upon a showing that an "*appreciable segment*" of commerce, was affected. But, as pointed out above, this case ought not to have been decided solely by resort to an "appreciable segment" of commerce theory.

The exclusion of this evidence was certainly not required by the decisions of this Court under the facts of our case. This was evidence which was peculiarly relevant and material to that broad factual inquiry necessary to determine the presence or absence of prejudice to the public interest from the practices complained of.

The exclusion of this evidence was error.[68]

The District Court was required to consider "the facts peculiar to the business . . . its condition before and after the restraint was imposed; the nature of the restraint *and its effect*, actual or probable." (*Chicago Board of Trade v. United States*, 246 U. S. 231, 238.) It was required to consider "the economic conditions peculiar to the . . . industry . . . and the *probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest* . . ." (*Appalachian Coals, Inc., v. United States*, 288 U. S. 344, 361.) Its duty required recognition of the fact that in "the cases considered by this Court since the *Standard Oil* case in 1911 . . . in general restraints upon competition have been condemned only when their purpose or effect was to *raise or fix the market price* . . . that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial *as to affect market prices*" (*Apex Hosiery Co. v. Leader*, 310 U. S. 469, 500); that "it is only when a restriction of production either inevitably *affects prices*, or is intended to do so, that it violates sec. 1 of the Act." (*United States v. Aluminum Co. of America*, 148 F. 2d 416, 424 (C. C. A. 2).)

[68]Error is specifically assigned. [R. 1872-1875.]

In *Standard Oil Co. v. United States*, 283 U. S. 163, the question presented under secs. 1 and 2 of the Sherman Act was the "effect" of certain contracts between large oil companies cross-licensing patents relating to "cracking" processes and fixing and agreeing (p. 168) upon a division of royalties from licensees under such patents. Holding (p. 176) that "no monopoly, or restriction of competition . . ." had been proved, Mr. Justice Brandeis speaking for the Court pointed out (pp. 175, 176, 177) that while defendants controlled 55% of the total cracking capacity (the remainder being distributed among 21 independents), "cracked" gasoline production was about 26% of the total gasoline production; "cracked" gasoline and straight run gasoline were sold interchangeably; and "*defendants could not effectively control the supply or fix the price* of cracked gasoline . . . unless they could control, through some means, the remainder of the total gasoline production from all sources. Proof of such control is lacking." The opinion states (p. 177) that "Evidence of the total gasoline production, by all methods, . . . is either missing or unsatisfactory in character. The record does not accurately show even the total amount of cracked gasoline produced, or the production of each of the licensees, or competing refiners. . . ." And (p. 182) the court [below] entirely disregarded not only the fact that the manufacture of the cracked is only a part of the total gasoline production, but also the evidence showing active competition among the defendants themselves and with others."

Thus this Court emphasized the importance of economic and competitive factors which might indicate whether defendants could effectively control the supply or fix prices; pointed to the absence of proof which would resolve this

question, and plainly indicated that the trial court had disregarded the over-all competitive picture. The same comment would be appropriate in our case.

To determine in our case whether there was injury to the public interest, the District Court should have considered and weighed the competitive and economic factors, which is disregarded.

As trier of the facts the District Court applied an erroneous rule of law—the "appreciable segment" of commerce theory. *Defendants below were entitled to have the facts considered and weighed on a correct rule of law* —the "detriment to the public interest" theory. Unless the government can show that no conclusion from the facts (both evidence received and evidence excluded) could reasonably be drawn which on the correct theory would have warranted a judgment in favor of defendants, the judgment should be reversed. *Indiana Farmer's Guide v. Prairie Farmer*, 293 U. S. 268, 281 (1934) is directly in point.[69]

Here the government cannot show that no trier of fact applying a correct theory could reasonably have come to a conclusion favorable to Standard.

Even if we disregard the evidence which was excluded and take only the evidence in our record, the conclusion is inescapable that there was no unreasonable restraint. This conclusion is developed in the argument which follows.

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[69] There the lower court applied an erroneous rule of law to the facts. The parties who obtained the judgment below failed to show that the judgment was right despite the "untenable grounds" upon which it was predicated. This Court accordingly reversed the judgment.

III.

## THE DISTRICT COURT ERRED IN CONCLUDING UPON THE EVIDENCE RECEIVED THAT THERE WAS A VIOLATION OF EITHER THE SHERMAN ACT OR THE CLAYTON ACT.

### (1) The "Requirements" Contracts Are Not Within the Purview of the Clayton Act.

Sec. 3 of the Clayton Act makes it unlawful for any person to make a contract for the sale of goods "on the condition, agreement, or understanding" *that the purchaser "shall not use or deal in the goods . . . of a competitor"* where the effect of such contract may be "to substantially lessen competition or tend to create a monopoly in any line of commerce."

The "requirements" contracts do not fall within this language. Under each of them the dealer agrees to purchase from Standard his "requirements" for resale *at a specified service station.* He does not agree to buy from Standard *all* his "requirements" wherever they may be needed. Under this type of contract the dealer may install a competitive gasoline pump next door, or across the street, or six blocks away. He does not purchase on the "condition, agreement, or understanding" that he will "not use or deal in the goods . . . of a competitor."

*Federal Trade Comm. v. Sinclair Co.*, 261 U. S. 463 (1923), is in point. There it was held lawful under sec. 3 of the Clayton Act for a service station dealer to agree to buy exclusively from Sinclair all the gasoline he required for resale *from a specified pump.* If a contract for exclusive dealing *with respect to gasoline to be resold from a specified pump* is not within the statute, a contract for

exclusive dealing *with respect to gasoline to be resold from a specified service station* should not be held to be within the statute.

It is no reply to this argument to urge that a dealer may presently have only one service station to which his contract with Standard is made applicable, and that he would have to acquire another location in order to handle the products of one of Standard's competitors. Evidence is lacking that each dealer had only one location. Also, in the *Sinclair* case the dealer would have had to procure and install a new pump in order to handle the products of one of Sinclair's competitors.

Moreover, it is important to observe that in the *Sinclair* case, the restriction upon the station operator's dealing with a competitor was, as a practical matter, quite as far reaching as in our case, for in the *Sinclair* case the *Commission found that only a small proportion of Sinclair's lessees required or used more than one pump.*[70] Thus in the *Sinclair* case the practical effect of the agreement was to confine a large proportion of the dealers to the purchase of only Sinclair gasoline at the station of each such

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[70]Thus in the *Sinclair* case the Commission found (see 261 U. S. at 471):

"4. That the contracts mentioned in the preceding paragraph also provide that such equipments shall be used by the lessee only for the purpose of holding and storing the respondent's petroleum products; that a small proportion of such lessees handle similar products of respondent's competitors; *and that only a small proportion of such lessees as handle similar products of respondent's competitors require or use more than a single-pump outfit in the conduct of their said business; that the practice of leasing such devices requires a large capital investment; that many competitors of respondent do not possess sufficient capital and are not able to purchase and lease devices as respondent does as aforesaid, partly by reason of which such competitors have lost numerous customers to respondent;* that the effect of the practice of leasing by contract

dealer. In our case the "requirements" contracts have no wider effect.

The rule of the *Sinclair* case must be this: When sec. 3 of the Clayton Act forbids a condition, agreement or understanding that the purchaser "shall not . . . deal in the goods . . . of a competitor," the thing forbidden is some condition, agreement or understanding that the purchaser will not deal in a competitor's goods *anywhere or at all*—that conditions, agreements, or understandings falling short of this and forbidding a use or dealing in a competitor's goods at a specified gasoline station or forbidding any other *limited use or dealing* are not prohibited.

If this is not the correct rule and a restriction upon even a limited use or dealing is prohibited, the scope of sec. 3 is extended far beyond anything which could have been intended by Congress—extended to every contract for the sale of goods in interstate commerce, provided such contract substantially lessens competition or tends to create monopoly.

In the foregoing we have been discussing simply what contracts fall within the language of the first part of

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such equipments, where such contracts contain the said provision restricting the use of the same to the storage and handling of respondent's products as aforesaid, may be to substantially lessen competition and tend to create for the respondent a monopoly in the business of selling petroleum products."

And this Court took cognizance of this finding, for we find in the opinion the following (see 261 U. S. at 473):

"*But, counsel for the Commission insist that, inasmuch as lessees generally—except garage men in the larger places—will not encumber themselves with more than one equipment, the practical effect of the restrictive covenant is to confine most dealers to the products of their lessors*, and we are asked to hold that, read in the light of these facts, the contract falls within the condemnation of the statute."

sec. 3, *i. e.*, what is meant by the reference therein to a condition, agreement, or understanding that the purchaser "shall not . . . deal in the goods . . . of a competitor." We believe that the foregoing demonstrates the error of the District Court in concluding that Standard's "requirements" contracts contained any such condition, agreement, or understanding. Such contracts were for supply *at a limited location*.[71]

The District Court also erred in concluding that the "requirements" contracts were vulnerable to the further requirement of sec. 3 of the Clayton Act, *i. e.*, erred in concluding that the contracts have the effect of *substantially lessening competition or tending to create a monopoly*. This error is pointed out in the argument which follows.

### (2) The "Requirements" Contracts Have Been in Use for so Long a Period That Their Effect Can Be Evaluated Without Speculating as to Their "Probable" or "Possible" Future Effect.

As pointed out in the opening Statement, "requirements" clauses have been in use by Standard in the Western area since about 1938.[72] Practical experience has demonstrated their "effect." Granted that the Clayton Act seeks to reach "agreements embraced within its sphere in their incipiency,"[73] no effort was made to attack these contracts in their incipiency. The attack upon them in this case

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[71] Error is specifically assigned. [R. 1868.]

[72] Not only has Standard used these "requirements" clauses for many years, but Standard's principal competitors have for many years engaged in similar practices. See page 23 and footnote 23 herein.

[73] *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 356 (1922).

was the first attack, and it came after they had been in use for about nine years.

Hence speculation as to the "probable" or "possible"[74] future effect of the clauses is unnecessary. Their "effect" has been amply demonstrated by long continued use.

The District Court seems to have adopted this view of the matter: In its supplemental opinion it said: "*In the present case*, as appears from the original opinion, *we are dealing not with probabilities but with actualities.*" [R. 165.]

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[74]Under sec. 3 of the Clayton Act it has been held that Congress by declaring illegal agreements the effect of which "may be" to substantially lessen competition, did not intend "to prohibit the mere possibility of the consequences described"; that it "was intended to prevent such agreements as would under the circumstances disclosed *probably* lessen competition, or create an actual tendency to monopoly." *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 356 (1922).

The same rule of "*probability*" was applied in *Federal Trade Comm. v. Sinclair Refining Co.*, 261 U. S. 463, 475 (1923).

The same rule of "*probability*" was stated in *International Shoe Company v. Federal Trade Commission*, 280 U. S. 291, 298 (1930) dealing with identical language in sec. 7 of the Clayton Act.

The opinion in *Corn Products Co. v. Comm'n*, 324 U. S. 726 (1945), dealing with identical language in sec. 2(a) of the Clayton Act, contains a statement (p. 738) approving the rule of "*probability*" and quoting from the *Standard Fashion* case; also later language (p. 742) where the term "*possibility*" is employed.

The latter language is quoted in the majority opinion in *Federal Trade Comm'n v. Morton Salt Co.*, 334 U. S. 37, 46 (1948), which likewise dealt with sec. 2(a) of the Clayton Act, but with a footnote stating that such language is to be read in the light of the earlier statement in the *Corn Products* case which announced the rule of "*probability.*" Mr. Justice Jackson and Mr. Justice Frankfurter in their separate opinion in the *Morton Salt* case are of the view that the majority opinion departs from the rule of "*probability*" and adopts a rule of "*possibility*," and on this feature of the case disagree with the majority opinion.

### (3) The "Requirements" Contracts Are Not an Unreasonable Restraint and Have Not Had the Effect of Substantially Lessening Competition or Tending to Create Monopoly.

Even without reference to the evidence which was excluded, and considering solely the record as it stands, there is no support whatever for the District Court's conclusion that the "requirements" contracts were an unreasonable restraint, or its conclusion that they substantially lessened competition and tended to create monopoly.[75]

Standard cannot and does not force contracts on dealers. Standard does not sell an article which it monopolizes by patent or otherwise. It does not sell an article which the dealer must buy from Standard or go without. Thus, the dealer is free to select his supplier—either Standard or one of its numerous competitors. This is true with respect to the several products involved.

The dealer is free to buy his *gasoline* from Standard or from any one of a large number of other gasoline suppliers. [R. 1074, 1316, 212.] There are 80 such suppliers in the Western area [R. 1675, 1676, 939] where Standard sells to dealers 6.7% of the taxable gasoline gallonage. [R. 1656, 939.] To get Standard's gasoline the dealer does not have to make any contract whatever with Standard. He can buy gasoline from Standard on open account[76] without a contract for any period he chooses, and then switch to some other supplier. [R. 241, 242, 265.] True, Standard will not continue to sell him gasoline

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[75]Error is specifically assigned. [R. 1867.]

[76]On March 12, 1947, 742 dealers were doing this. [R. 1316, 212.]

if he buys gasoline from another supplier for the same station [R. 242, 269, 1127], but this is substantially the universal practice in the Western area, where out of 36,500 outlets only 1.6% are "split-pump" outlets. [R. 1062, 1763-1777, 1064.] If the dealer signs one of Standard's Dealer Agreements, he can cancel such agreement at the end of the first 6 months or at the end of any 6 months period thereafter [R. 1302, 211] and switch his patronage to another supplier.

The dealer is free to buy his *lubricating* oil from Standard or from any one of a large number of suppliers. [R. 1074, 1075.] There are at least 69 such suppliers in the Western area [R. 1864, 1865, 1148] where Standard sells to dealers only 5% of the lubricating oil. [R. 1660, 939.] To get Standard's lubricating oil the dealer does not have to make any contract whatever with Standard. He can buy lubricating oil from Standard without a contract for such period as he chooses, and then switch to some other supplier. [R. 1074, 1075.] Standard will sell him lubricating oil without a contract of any kind even though his station handles the gasoline, or the tires, tubes or batteries furnished by another supplier. [R. 1074, 1075.] And, as already noted, if the dealer elects to sign one of Standard's Dealer Agreements, he can cancel such agreement at the end of any 6 months period. [R. 1302, 211.]

The dealer is free to buy his *tires, tubes or batteries* from Standard or from any one of a large number of suppliers. There are many[77] such suppliers in the Western area, where Standard sells to dealers only 2% of the

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[77]Companies competing with Standard *in the sale of gasoline* through retail dealers promote 27 lines of tires and 28 lines of batteries. [R. 1069.] But tires and batteries are sold at many retail outlets other than retail gasoline outlets.

tires and 1.8% of the batteries. [R. 1664, 1668, 939.] If he wants to handle Standard's tires, tubes and batteries the dealer will have to execute one of Standard's Dealer Agreements TBA, which also requires him to purchase at the particular location Standard's petroleum products. [R. 1308, 211.] But this is not prohibited by the Act in the absence of "monopoly or combination." (*Federal Trade Comm. v. Gratz*, 253 U. S. 421.)[78] Moreover, if the dealer signs a Dealer Agreement TBA, he can cancel such agreement at the end of 6 months or at the end of any 6 months period thereafter [R. 1310, 211] and switch his patronage to another supplier.[79] If the dealer wants to handle Standard's gasoline or lubricating oil or both of these products, but wants to handle the tires, tubes or batteries of some other supplier, he is perfectly free to do so, and in such case, as already noted, he can purchase Standard's gasoline and lubricating oil, or either one of them, with or without a contract. [R. 1075.]

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[78] In that case, Gratz, engaged in the practice of selling steel ties and jute bagging for baling cotton, adopted the practice of refusing to sell ties unless the prospective purchaser thereof would also buy from Gratz the bagging to be used with the number of ties purchased. This practice was upheld, the Court declaring (p. 428):

"All question of monopoly or combination being out of the way, *a private merchant, acting with entire good faith, may properly refuse to sell except in conjunction, such closely associated articles as ties and bagging.* If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved."

[79] The only agreement form (excluding subleases) used by Standard which does not contain this 6 months termination clause is the Petroleum Products and Equipment Agreement. [R. 1305, 211.] The obvious reason for this is that under the latter agreement Standard obligates itself to undertake the cost of installing equipment—a cost which it would not assume without some assurance of continued relations for a definite period. Of the "requirements" contracts outstanding, the Petroleum Products and Equipment Agreements represent approximately 19%. [R. 1313, 212.]

### (A) THERE WAS NO UNREASONABLE RESTRAINT.

The only "restraint" charged was restraint of that segment of the market represented by the dealers with whom Standard had "requirements" contracts.[80]

Monopoly of petroleum products, tires, batteries and accessories *generally* was not charged—merely monopoly of the business of the outlets with which Standard had "requirements" contracts.

The "requirements" contracts have been in use for about nine years. The facts demonstrate that their "effect" has *not* been "to unreasonably restrict the opportunities of competitors to market their product."[81]

The absence of unreasonable restraint is shown by a comparison of our case and *United States v. Columbia Steel Co.*, 334 U. S. 495.

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[80] Thus during the trial Mr. Dixon, who was in charge of the government's case, said: "I felt from some remarks Your Honor had made that perhaps I had been remiss in presenting the position of the Government on *the competition that we claim had been restricted. . . . It is the competition for this market that Standard has with these dealers. That is the only competition that we claim is restricted, in any sense of the term, Your Honor."* [R. 850, 851.]

Mr. Dixon also stated: ". . . we are not charging Standard here of having a monopoly of all of the petroleum business or all of the automotive accessory business in the seven western states at all. But we do contend . . . that as to the outlets subject to these contracts that they do have such a monopoly. . . ." [R. 1164.]

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"We are, however, not charging Standard here with having a monopoly of all of the business or a monopoly of the petroleum business or of the automotive accessory business, but we do charge that they have monopolized by these contracts *an appreciable segment* of that business in this area." [R. 1186.]

[81] *United States v. Columbia Steel Co.*, 334 U. S. 495, 524 (1948).

In our case Standard's gasoline sales through retail-dealer outlets were 6.7% of the taxable gasoline gallonage [R. 1656, 939];[82] its dealer sales of lubricating oil were 5% of the total [R. 1660, 939], of tires 2% of the total [R. 1664, 939], and of batteries 1.8% of the total [R. 1668, 939.]

In the *Steel case* U. S. Steel was the country's largest producer of rolled steel products producing during 1937 to 1941 something like 33⅓% of the country's rolled steel products with average annual sales of $1,000,000,000 (p. 500).

In our case through "requirements" contracts Standard obtained *during the life of such contracts only* the exclusive patronage of 5197 scattered dealers at specified locations, [R. 1315, 212.] Their annual purchases from Standard aggregated $65,846,412. [R. 180.]

In the *Steel case*, through purchase of Consolidated Steel ("vertical integration") U. S. Steel obtained *for all time to come* the exclusive patronage of Consolidated (p. 523). The latter's purchases of rolled steel products in 10 years had exceeded 2,000,000 tons (p. 508), and amounted to over $5,000,000.00 annually (p. 537); and were 3%[83] of the demand for such products in the eleven-state area found to be the competitive area.

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[82]In the populous Los Angeles basin and San Francisco bay areas Standard's percentages were 2.45% and 5.[illegible]% respectively. [R. 1649, 1652, 910.]

[83]The District Court misread the opinion of this Court in the *Columbia Steel* case. Commenting on the latter opinion the District Court in its Supplemental Opinion said [R. 162]: "In effect, the court rules that Consolidated's acquisition would not have any great effect on the market, in view of the fact that its requirements

In our case the government's contention was that it was illegal restraint to exclude other suppliers from the business of supplying the 5197 dealers at specified locations.

In the *Steel case* the government's contention was that there was "illegal restraint . . . because all manufacturers except United States Steel will be excluded from the business of supplying Consolidated's *requirements* of rolled steel products" (p. 507).

The decision in our case should have been in accord with the decision in the *Steel case, i. e.,* that there was no unreasonable restraint.

Clearly in our case the basic facts, tested by a comparison with the facts in the *Steel case,* show that the "effect" of the "exclusive dealings . . . brought about by" the contracts in question was *not* "to unreasonably restrict the opportunities of competitors to market their product."[84]

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are 'an insignificant fraction of the total market,—*less than ½ of 1%.*'" In this passage thus quoted from this Court's opinion in the *Columbia Steel* case this Court was commenting upon the *appellees' contention* in the *Columbia Steel* case predicated upon a *nation-wide market* (334 U. S. 495, at 508)—a contention this Court *did not adopt.* Thus this Court said (334 U. S. 495, at 527): "We accept as the relevant competitive market the total demand for rolled steel products in the *eleven-state area;* over the past ten years Consolidated has accounted for only *3%* of that demand, and if expectations as to the development of the western steel industry are realized, Consolidated's proportion may be expected to be lower than that figure in the future."

[84] *United States v. Columbia Steel Co.,* 334 U. S. 495, 524 (1948).

## (B) THERE WAS NO SUBSTANTIAL LESSENING OF COMPETITION.

Assuming, for the purpose of argument only, that the "requirements" contracts were within the purview of the Clayton Act, the government had the burden of making "a definite factual showing of illegality,"[85] *i. e.*, of showing that the effect of the contracts was to substantially lessen competition or tend to create monopoly. If they actually had such effect, one would suppose that it would have been disclosed in nine years, and that the government's proof would show (a) that the number of Standard's competitors had diminished, or (b) that the size and power of its competitors had grown less, or (c) that its competitors had a smaller and smaller proportion of the available customers or volume of business.

There was no such proof. Nor was there any proof that Standard had a monopoly or a tendency toward monopoly or a purpose or intent to monopolize or exert monopoly power. Such evidence as the record contains—and it is uncontradicted—was all to the contrary. It repels any conclusion that there was any substantial lessening of competition or tendency to create monopoly.

The competitive aspects of the picture presented by the proof show no *lessening of competition*. After about nine years during which the "requirements" contracts have been in use [R. 171], Standard has at least 79 other

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[85] *Standard Oil Co. v. United States*, 283 U. S. 163, 179 (1931); *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 377 (1933).

gasoline competitors [R. 1675, 1676, 939], at least 68 other lubricating oil competitors [R. 1864, 1865, 1148], and many[86] tire and battery competitors, and sells in the Western area through dealer outlets 6.7% of the taxable gasoline gallonage [R. 1656, 939], 5% of the lubricating oil [R. 1660, 939], 2% of the tires [R. 1664, 939], and 1.8% of the batteries [R. 1668, 939]. In the most populous areas it was in this competitive position: In the Los Angeles basin area its dealer stations were 3.68% of the total service stations and its gasoline sales were 2.43% of the total gasoline gallonage distributed through all stations, its smaller competitors (exclusive of its six major competitors) having 47.15% of the service stations and supplying 43.60% of the gasoline gallonage. [R. 1649, 910.] In the San Francisco bay area its dealer stations were 6.98% of the total service stations and its gasoline sales were 5.52% of the total gasoline gallonage distributed through all stations, its smaller competitors (exclusive of its six major competitors) having 28.49% of the service stations and supplying 23.94% of the gasoline gallonage. [R. 1652, 910.] Between 1936 and 1946 in the Western area Standard's dealer sales of gasoline increased 58% [R. 1656, 939], but sales of gasoline in the industry in such area increased 64% [R. 1656, 939]; Standard's dealer sales of lubricating oil increased 62% [R. 1660, 939] but sales of lubricating oil in the industry in such area increased 104%. [R. 1660, 939.] A tabulation set out in the opening Statement (page 30 herein) shows from year to year, during the period the "requirements" contracts have been in use,

[86]Companies competing with Standard *in the sale of gasoline* through retail dealers promote 27 lines of tires and 28 lines of batteries. [R. 1069.] But tires and batteries are sold at many retail outlets other than retail gasoline outlets.

Standard's percentage of the "industry" total sales of gasoline, lubricating oil, tires and batteries. It shows that Standard's dealer sales of gasoline, tires and batteries have not increased proportionately to total sales, and that its dealer sales of lubricating oil have decreased proportionately to total sales over such period.[87]

There was no testimony of any competitor supplier who was forced out of business or whose business advancement suffered as a result of Standard's contracts.[88] There was evidence to the contrary. For example, in the lubricating oil field Pennzoil increased its outlets in 30 years from 2,000 to somewhere between 8,000 and 12,000 [R. 375, 376]; Macmillan sold to 9,000 or 10,000 accounts in 1947 [R. 324]; and Quaker State sold to 4,000 or 5,000 accounts in 15 California counties. [R. 464.]

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[87]In *Pick Mfg. Co. v. General Motors Corp.*, 80 F. 2d 641 (C. C. A. 7, 1935; affirmed in 299 U. S. 3), upholding under sec. 3 of the Clayton Act a form of dealer's contract obligating the dealer to use in the repair of Chevrolet cars only parts manufactured or authorized by Chevrolet, the Court said (p. 644):

"Furthermore, the record shows that *competition* in the sale of replacement parts for automobiles, *instead of growing less has substantially increased through the period during which the provisions complained of have been in force* and, while it may be that competition would have increased more rapidly in the absence of such provisions, *the trial court rightfully concluded that such was not the 'substantial lessening of competition' which the Clayton Act was designed to prevent.*"

[88]The government called 34 witnesses who were lubricating oil, tire, battery and automobile accessory salesmen or the executives of companies handling one or more of these products. Many of them testified to the difficulty or impossibility of selling their products to service station or garage dealers who were under contract with Standard. It also called as witnesses 13 service station dealers who currently handled or had in the past handled Standard's products under contract. Some of these gave testimony indicating that Standard expected its dealers under contract to abide by their contractual obligations and buy their "requirements" from Standard. The testimony of these 47 witnesses was perhaps 60% of the entire volume of oral testimony taken at the trial.

None of this testimony did more than indicate that the dealers were complying with their obligations under their "requirements"

There was uncontradicted evidence that Standard's numerous competitors freely and constantly compete with Standard for the patronage of dealers. The competitor freely seeks new sites in competition with Standard [R. 1065, 1066, 1067], and freely seeks to induce a dealer who is not under contract with Standard or whose contract with Standard has expired[89] to contract with the competitor. [R. 1067, 1068.][90] This activity goes on continuously. The uncontradicted evidence was that other companies competed with Standard in the sale of petroleum products, tires, tubes, batteries and accessories *"very aggressively."* [R. 1065.] To get business away from Standard they installed facilities for the dealers, absorbed rentals, loaned money and sought in "a variety of ways to interest the dealer in switching to other products." [R. 1068.] In the eight or nine years preceding 1947 the

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contracts, *i.e.,* that a given dealer under contract with Standard was buying his "requirements" at a given location from Standard.

The complaints of these salesmen and their employers were no more than the complaints of a salesman who has "lost a customer" to a competitor. These complaints were no different than that which might be made by any salesman who finds that a prospective customer has been "signed up" by a competitor for a supply of goods the salesman had hoped to sell such prospective customer. *If Standard had not used "requirements" contracts but had made contracts with the dealers for definite quantities, the witnesses referred to could have given the same testimony.*

None of this character of testimony touched the question of *gasoline,* and none of these witnesses testified that they couldn't find purchasers for their products.

[89] Standard's Dealer Agreement [R. 1301, 211], Dealer Agreement TBA [R. 1308, 211] and Distributor Agreement [R. 1304A, 211] are terminable *by either party* on 30 days notice at the end of the first 6 months or at the end of any 6 months period thereafter.

[90] Thus, Edward P. McCall, assistant to the vice-president of Tide Water Associated Oil Company [R. 826], when asked on cross-examination by government counsel if his company solicited the business of selling gasoline to any dealer operating a Chevron station, replied: "We endeavor to take the whole station. . . ." [R. 860.]

number of Standard's retail dealer outlets diminished by about 2500. [R. 238, 239.]

These facts show no lessening of competition, substantial or otherwise.

In considering the presence or absence of prejudice to the public interest from the use of these "requirements" contracts, the following additional facts are important and undisputed.

"Experience has proven" that there is a definite danger of substitution of products if a service station handles the petroleum products of more than one supplier. This is especially true in the case of gasoline.[91] There was uncontradicted testimony that dealers handling the gasoline of more than one supplier ("split-pump" dealers) in many instances sold gasoline out of one pump when the customer thought he was buying from another pump. This was the so-called "long-hosing" practice. [R. 1106, 1107.] Dealers also transferred gasoline from one underground tank to another tank. [R 266.] Obviously this was a compelling reason for refusing to sell gasoline to "split-pump" accounts.[92] The uncontradicted evidence was that it was the "primary reason." [R. 1106.]

Experience also showed that dealers "were not favorable" to handling the products of different suppliers, because (a) they didn't have "the merchandising support" of a single supplier, and (b) they didn't have "an assur-

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[91] There was also uncontradicted testimony of the danger of substitution in the case of lubricating oil. [R. 1107.]

[92] As said by this Court in justifying the practice upheld in *Federal Trade Comm. v. Sinclair Refining Co.*, 261 U. S. 463, 475 (1923): "He [the refiner] is also vitally interested in putting his brand [of gasoline] within easy reach of consumers *with ample assurance of its genuineness.*"

ance of supply," where they were handling the products of more than one supplier. [R. 266, 269.]

Delivery costs are higher in the case of a "split-pump" station than in the case of a station handling the gasoline of a single supplier. It costs "from a cent to a cent and a half a gallon more to serve a split-pump account." [R. 266.] This is true because of uncertainty with respect to the quantities to be delivered and "the constant sales followup that is required to maintain representation with that account." [R. 266.][93]

"Split-pump" outlets (*i. e.* dealers handling the gasoline of more than one supplier) have substantially disappeared from the Western area. Out of 36,500 retail outlets in that area in 1947, only 1.6% were "split-pump" outlets. [R. 1062, 1763-1777, 1064.]

*Obviously, there were economic factors—quite apart from "requirements" contracts—which were responsible for this result. Obviously it was these economic factors which years ago brought about the use of these "requirements" contracts.* This repels any conclusion that these contracts were the result of a "calculated scheme to gain control" of outlets or "restrain or suppress competition." (*United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 174.)

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[93]For a summary of the testimony showing the reasons why suppliers and dealers generally have adopted the single-supplier system, see page 16, and footnote 17 herein.

## (C) THERE WAS NO MONOPOLY OR TENDENCY TO CREATE MONOPOLY.

Since sec. 3 of the Clayton Act became law this Court has had occasion to consider the applicability of that section in only eight cases. In five of these cases the practices attacked were held to violate the section; in three the section was held not to have been violated.

In the five cases in which sec. 3 was held to have been violated, the effect of the activities involved was *to create monopoly or enlarge an existing monopoly.* Three of these, the *United Shoe Machinery* case, the *International Business Machines* case and the *International Salt* case, were typical "tying-clause" cases in which a manufacturer, having a patent monopoly in the manufacture of one article, sought to enlarge such monopoly by obligating a lessee of the patented article to purchase something additional.[94] A patent grants a monopoly. If leave to use

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[94]In *United Shoe Machinery Corp. v. United States,* 258 U. S. 451 (1922), the company, according to the finding of the District Court, "*controlled more than 95 per cent*" of the business of supplying shoe machinery. (p. 455.) It leased its *patented* (p. 455) machines with tying-clauses obligating the lessee to use exclusively machinery of certain kinds made by the company or lose its right to use any of the company's machinery, also to purchase supplies exclusively from the company, also to use the company's machines only on shoes on which other operations had been performed by the company's machines, also to take all additional machinery from the company or lose its right to retain the leased machinery, also to pay royalty to the company on shoes operated upon by machines made by competitors, etc. (pp. 456, 457.) The Court said (pp. 457, 458): "When it is considered that the United Company *occupies a dominating position* in supplying shoe machinery of the classes involved, these covenants signed by the lessee and binding upon him effectually prevent him from acquiring the machinery of a competitor of the lessor except at the risk of forfeiting the

the patented article is granted upon condition that the user will buy from the patent owner all unpatented supplies used in or in connection with the patented article, the monopoly enjoyed by the patent owner is enlarged to cover unpatented articles, thus (in the language of sec. 3 of the Clayton Act) tending to create a monopoly in the latter.

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right to use the machines furnished by the United Company, *which may be absolutely essential to the prosecution and success of his business.*"

In *International Business Machines Corp. v. United States*, 298 U. S. 131 (1936), International and Remington Rand, Inc., also a defendant, were the *only manufacturers* of a certain type of *patented* (p. 134) machine. The machine was leased upon condition that the lessee would use in the machine only tabulating cards purchased from the lessor. (p. 135.) This resulted in giving International 81% and Remington Rand 19% of the business in tabulating cards (p. 136), *i.e.*, a complete monopoly of the tabulating card business.

In *International Salt Company v. United States*, 332 U. S. 392 (1947), the company leased *patented* machines (p. 394) for dissolving rock salt and injecting salt into canned products on condition that the lessee purchase from the company all unpatented salt and salt tablets consumed in the leased machines. (p. 394.) The Court said (p. 395): "The appellant's patents confer *a limited monopoly* of the invention they reward. From them appellant derives a right to restrain others from making, vending or using the patented machines. But the patents confer no right to restrain the use of, or trade in, unpatented salt. By contracting to close this market for salt against competition, International has engaged in a restraint of trade for which its patents afford no immunity from the antitrust laws."

In several cases in the lower Federal courts where sec. 3 of the Clayton Act has been held applicable, defendant's contract required the other party to buy from defendant all his supplies used in con-

In our case Standard never had any monopoly, patent or otherwise.

In the fourth case, the *Standard Fashion* case, the manufacturer had no patent monopoly, but by covenants obligating retail dealers not to handle competing products, demonstrated at least a strong tendency to monopoly by controlling 40% of the nation's retail dealers in its

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nection with a patented article obtained from defendant on lease or other arrangement, *i.e.*, tied unpatented articles to patented articles. *Radio Corporation v. Lord*, 28 F. 2d 257 (C. C. A. 3, 1928; cert. den. 278 U. S. 648); *Oxford Varnish Corp. v. Ault & Wiborg Corp.*, 83 F. 2d 764 (C. C. A. 6, 1936); *Philad Co. v. Lechler Laboratories*, 107 F. 2d 147 (C. C. A. 2, 1939); *Landis Machinery Co. v. Chase Tool Co.*, 141 F. 2d 800 (C. C. A. 6, 1944); *Standard Register Co. v. American Sales Book Co.*, 148 F. 2d 612 (C. C. A. 2, 1945).

"Monopoly may likewise be furthered where the commodity to which the tying-clause is attached is not a patented article but is nevertheless a commodity in the manufacture of which defendant has a practical monopoly. By tying to such commodity an obligation to purchase other commodities sold by defendant, the latter unlawfully extends the practical monopoly he enjoys with respect to the first commodity. Thus in *Carter Carburetor Corp. v. Federal Trade Commission*, 112 F. 2d 722 (C. C. A. 8, 1940), Carter carburetors were standard equipment on 60% of all 1937 passenger cars. Therefore a repair shop or garage attempting to service all makes of passenger cars *had to carry* Carter carburetors in stock. Hence Carter's notice that it would allow discounts only to shops and garages which agreed not to handle a competing product was, in effect, the *extension* of an existing *practical* monopoly. See, on the other hand, *B. S. Pearsall Butter Co. v. Federal Trade Commission* 292 Fed. 720, 722 (C. C. A. 7, 1923), where the product covered by exclusive dealing contracts was a "standardized product," which could "readily be supplied by many other makers," and the contracts were upheld.

product.[95] In this case the Court emphasized the fact that many small communities had only one such dealer and that in larger communities the manufacturer controlled the dealers "most resorted to" by customers.

In our case there is neither finding nor evidence indicating that Standard's retail dealers are the only dealers in any community or the dealers "most resorted to therein."[96]

In the fifth case, the *Fashion Originators' Guild* case, there was an *admitted purpose and intent* by powerful concerted action on the part of numerous manufacturers to drive competing manufacturers out of business and thus "create in themselves a monopoly."[97]

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[95]In *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346 (1922), the Fashion Company, or its holding company, controlled 40% of the nation's retail dealers in patterns for women's and children's garments through contracts obligating the dealer not to sell other makes of patterns. (p. 357.) The Court quoted with approval the following summary of the matter by the Circuit Court (p. 357): " 'The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities, amount to giving such single pattern manufacturer *a monopoly of the business* in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers *most resorted to by customers whose purchases tend to give fashions their vogue* may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business.' "

[96]As already pointed out, the District Court recognized a failure of the government's proof to support the complaint's allegations that Standard's dealers occupied *"favorably situated"* retail outlets. (See page 12 and footnote 13 herein.)

[97]In *Fashion Originators' Guild v. Federal Trade Comm.*, 312 U. S. 457 (1941), the Guild, composed of manufacturers of textiles and 176 garment manufacturers, for the admitted purpose (p. 461) of destroying the competition of other manufacturers copying their designs, inaugurated and enforced a system whereby its members would sell textiles to garment manufacturers only on condition that the latter would not use or deal in textiles copied from designs of textile manufacturing Guild members and would sell manufac-

In our case there was neither finding nor evidence that Standard combined or conspired to monopolize, or had the purpose, or intent, or power to monopolize.

Thus *in the only cases in which this Court has held sec. 3 of the Clayton Act to be applicable, monopoly was an ingredient.* In the *United Shoe Machinery, International Business Machines,* and *International Salt* cases enlargement of an *existing patent monopoly* was attempted by "tying-clauses"; in the *Standard Fashion* case monopoly had been acquired in small communities where there was only one outlet controlled by Standard Fashion, as well as in larger communities where Standard Fashion controlled the outlets "most resorted to by customers"; and in the *Fashion Originators' Guild* case there was a clear purpose and intent by a powerful group to achieve monopoly by driving competitors out of business by an organized boycott.

In these five cases in which this Court held sec. 3 of the Clayton Act to be applicable, there was no intimation that

tured garments to retailers only on condition that the latter would not use or deal in such copied designs. (p. 464.) As a result approximately 12,000 retailers throughout the country agreed to "cooperate" in this boycott program. (p. 461.) The Court pointed out (p. 462): "The power of the combination is great; competition and the demand of the consuming public make it necessary for most retail dealers to stock some of the products of these [Guild] manufacturers. . . . (p. 466.) In this case, the Commission found that the combination exercised sufficient control and power in the women's garments and textile businesses 'to exclude from the industry those manufacturers and distributors who do not conform to the rules and regulations of said respondents, and thus tend to create in themselves a monopoly in the said industries.' . . . (p. 467.) . . . . the aim of petitioners' combination was the intentional destruction of one type of manufacture and sale which competed with Guild members. The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts."

"requirements" contracts are unlawful *solely* because they are numerous and involve a substantial volume of products. Something more is required to make them illegal—*prejudice to the public.* In the five cases referred to this prejudice was found because *the facts demonstrated* creation or enlargement of monopoly. But in our case the District Court decided that the government's case was "established" [R. 126] by number of contracts and volume of products—that the contracts affected an "appreciable segment" of commerce and that was an end of the matter. Other facts were disregarded. If this be the law, then every "requirements" contract affecting a sizeable quantity is unlawful and the scope of sec. 3 is infinitely and disastrously extended.

Two of the three cases in which sec. 3 was held *not* to have been violated contained little, if any, discussion by this Court which is helpful to a determination of the application of the section in our case.[98] However, the third case in which sec. 3 was held *not* to have been violated is very much in point. That case is *Federal Trade Comm. v. Sinclair Co.*, 261 U. S. 463, already referred to. There-

[98] In *Federal Trade Comm. v. Curtis Publishing Co.*, 260 U. S. 568 (1923), the company consigned its magazines to dealers, obligating the latter not to act as agent for or wholesale the periodicals of any competitor, but sec. 3 of the Clayton Act was held to be inapplicable on the ground that the dealers were agents and not purchasers of the magazines.

In *Pick Manufacturing Co. v. General Motors Corp.*, 299 U. S. 3 (1936), the company sold motor cars through dealers under a contract which obligated the dealer not to sell or use in the repair of the company's cars second-hand or used parts or parts not manufactured or authorized by the company. The District Court had found that the effect of this contract was not to substantially lessen competition or create a monopoly. The Circuit Court of Appeals had affirmed. This Court affirmed under the rule that it will accept findings in which two courts have concurred unless clear error is shown.

in Sinclair leased at a nominal rental underground tanks and gasoline pumps to numerous retail gasoline dealers on condition that the dealer would use such equipment solely for storing and handling Sinclair's gasoline. The Commission found (p. 471) that only a small proportion of the lessees required or used more than one pump. Thus the practical effect of the condition was to confine the lessees to Sinclair's gasoline. Nevertheless, this practice was upheld under sec. 3. The *Standard Fashion* case and the *United Shoe Machinery* case were distinguished. This Court said (p. 475):

> "*No purpose or power to acquire unlawful monopoly has been disclosed*, and the record does not show that the probable effect of the practice will be unduly to lessen competition. Upon the contrary, it appears to have promoted the public convenience by inducing many small dealers to enter the business and put gasoline on sale at the crossroads."

Use of monopoly power as a "leverage" to obtain something additional or enlarge the monopoly has recently been condemned under the Sherman Act in *United States v. Griffith*, 334 U. S. 100, 106, *Schine Theatres v. United States*, 334 U. S. 110, 116, and *United States v. Paramount Pictures*, 334 U. S. 131, 157, 158.

In the first two cases an exhibitor operating numerous motion picture theatres in various cities, in some of which there were no competing theatres, contracted with a distributor of films for privileges for *all* its theatres not accorded other distributors. It was held that this violated the Act, because such exhibitor had *utilized its monopoly position in the cities where it had a monopoly* to exact

privileges not enjoyed by competitors for all cities in which it had theatres.

In the last case referred to, "block-booking," *i. e.*, the licensing of one copyrighted motion picture on condition that the exhibitor also take one or more additional copyrighted pictures, was condemned on the ground that this was an enlargement of the copyright monopoly. It was said (p. 158) that where "a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and *strengthens its monopoly* by drawing on the other. . . . Even where all the films included in the package are of equal quality, the requirement that all be taken if one is desired increases the market for some. . . . *the result is to add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses.*"

In our case there was no evidence of the use of monopoly power as a "leverage."

At the trial two decisions were particularly relied upon by the government: *United States v. Yellow Cab Co.*, 332 U. S. 218, and *International Salt Co. v. United States*, 332 U. S. 392.

In both of these cases the facts presented to this Court showed that monopolies were contemplated and attained by the practices complained of.

In the *Yellow Cab* case, one of the restraints resulting from the conspiracy complained of was that through stock control CCM obligated cab operating companies in Chicago

to buy their cabs exclusively from CCM. Under the facts pleaded and accepted as true by this Court on appeal from the order granting a motion to dismiss,[99] a monopoly was contemplated and attained, for the Chicago cab buyers had 2,595, or 86% of the 3,000 *available* Chicago cab licenses (pp. 223, 230). *A Chicago ordinance limited to 3,000 the number of cab licenses which could lawfully be issued* (p. 223). Thus, *CCM obtained the exclusive business of buyers having by law a virtual monopoly.*

In our case there is nothing resembling this. The buyers with whom Standard contracted had no monopoly of the retail trade in any locality or in the entire area or by virtue of "favorably situated" locations. (See p. 12, and footnote 13 herein.) On the contrary *the "market" with which Standard and its competitors dealt was constantly expanding.* For example, between 1936 and 1946 (while Standard's "requirements" contracts were being used) total gasoline sales to all accounts increased 64% [R. 1656, 939] and total lubricating sales to all accounts increased 104%. [R. 1660, 939.] (During that period Standard's dealer sales of such products increased only 58% [R. 1656, 939] and 62% [R. 1660, 939] respectively.)

Another restraint resulting from the conspiracy complained of in the *Yellow Cab* case was that Parmelee Transportation Company *by agreement* with other Chicago cab operating companies was to have the exclusive right to engage in the business of transporting railroad passen-

[99] Upon remand of this case, the proof was found not to support the allegations of the complaint upon which this Court predicated its decision in 332 U. S. 218, and judgment went for the defendants (*United States v. Yellow Cab Co.*, ... Fed. Supp.

gers between Chicago railroad depots. This Court said (p. 229):

> ". . . *exclusive contracts for the transportation service in question are not illegal.* . . . *But a conspiracy to eliminate competition in obtaining those exclusive contracts* is what is alleged in this case and it is a conspiracy of that type that runs afoul of the Sherman Act."

Thus, a contract between a railroad and a cab company giving the latter an exclusive right to transport the railroad's passengers would not be illegal; an agreement between such cab company and its competitor cab companies that the latter would not seek contracts of this kind from the railroad would be illegal.

In our case there is nothing resembling this "parceling-out" of the available market. Standard's competitors have always been free to contract with dealers who were not already under contract with Standard, and to contract with the latter when their contracts with Standard expired. Standard's competitors have also been free to establish new station outlets, which may be created at comparatively small cost, for, as already pointed out, Standard's dealer outlets do not to any extent pre-empt the "favorably situated" locations. (See p. 12, and footnote 13 herein.) This is exactly what these competitors have done. The competition between Standard and other suppliers for contracts with dealers and for new sites has been vigorous and has been going on for a long time.

In the *International Salt* case (332 U. S. at 396) this Court said:

> "The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and *the tendency of the arrangement to accomplishment of monopoly seems obvious.*"

This was true because the contracts sought to extend the scope of an existing patent monopoly. The Court's statement in the *International Salt* case (332 U. S. at 396), quoted with approval in the *Griffith* case (334 U. S. at 107), that "it is unreasonable, *per se,* to foreclose competitors from any substantial market," must be confined to the setting of those cases—monopoly power used as a "leverage" to enlarge an existing "lawful" monopoly or exact privileges not enjoyed by competitors. Otherwise, this rule would condemn every supply contract which embraces a substantial quantity.

In our case there was no monopoly power. Standard does not sell any article in the distribution of which it has a monopoly, patent or otherwise. The kind of commodities which it sells may be purchased from many other suppliers. A retail dealer can successfully operate a service station selling no Standard products whatever. In the Western area something like 29,500 retail dealers in gasoline are doing this today. [R. 1062, 1763-1777, 1064.] In that area every retail dealer is free to select the company for which he will handle products and such selection is made from among a large number of companies competing for his patronage.

### (4) The District Court Failed to Find Facts Requisite to Show Illegality, i.e., Failed to Find Facts Showing That the Contracts Were an Unreasonable Restraint or Might Have the Effect of Substantially Lessening Competition or Tending to Create Monopoly.

The District Court's conclusions of law [R. 186] that sec. 1 of the Sherman Act and sec. 3 of the Clayton Act were violated are not supported by the findings of fact.

There being no restraint which was "illegal *per se*" and no "specific intent to accomplish a forbidden restraint" (see Point II(2) herein), the District Court should not have decided the case solely on its findings as to the contracts, the number of dealers under contract, and the dollar volume of products handled under such contracts. Findings concerning *many other competitive and economic factors* were requisite. (*United States v. Columbia Steel Co.*, 334 U. S. 495, 527.) (See Point II(3) herein.)

There were no findings concerning the following:[100]

(a) The number of dealers who handle the products of Standard's competitors, or whether such number has increased or decreased.

(b) The number of Standard's competitors, or whether such number has increased or decreased.

(c) The volume of products handled by Standard's competitors, or whether such volume has grown or declined in comparison with Standard's volume.

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[100] Prior to the making of findings, defendants in connection with their motion for a reconsideration of the District Court's opinion, called that Court's attention to the importance of most of these factors. [R. 142-157.]

Under Rule 52 of the Federal Rules of Civil Procedure, "requests for findings are not necessary for purposes of review."

(d) The fact that the increase in consumer demand and consumption has been greater than the increase in Standard's dealer sales.

(e) Standard's practice in supplying dealers without contracts, and the dealer's freedom of choice in selecting a supplier with whom to contract, and, if he selected Standard, the type of contract to be executed.

(f) The fact that dealers under contract with Standard do not have the "favorably situated" outlets, or a monopoly in any given area.

(g) The decrease in the number of Standard's dealer outlets.

(h) The practices of Standard's competitors in seeking contracts and in contracting with dealers.

(i) The general adoption of a single-supplier system of gasoline distribution in the Western area by a multitude of dealers handling the products of Standard's competitors.

(j) The reasons for a dealer's handling the products of only one supplier.

(k) The probable effect upon competition of an elimination of the "requirements" contracts.

The findings which were made dealt with Standard's operations *in a vacuum*—without reference to the competitive surroundings or background. The only possible ex-

ception to this is the finding [par. 25, R. 182] that Standard sells between 12 and 14 per cent of all the gasoline sold or distributed through independent retail dealer outlets in the "Western area"; that in the majority of states in that area Standard is the largest single marketer of gasoline through such outlets; and that Standard sold approximately 23 per cent of all gasoline sold in that area in 1946.[101]

The only finding dealing with the *intent, purpose,* or *effect* of the "requirements" clauses is par. 31. [R. 185.] The first part of this paragraph states that the "*intent, purpose* and *effect* of the exclusive supply provisions" of the contracts has been "to prevent the 'independent dealer' operating under said agreements from handling" competitive products. The remainder of the paragraph adds nothing to this. It declares in substance that the contracts were interpreted by the dealers to require exclusive handling of Standard's products; that the contracts denied the dealers access to competitive products; that the dealers have been prevented from purchasing merchandise in an open competitive market; and that the contracts were intended to and do confine the dealers to Standard's products.

In effect this finding simply declared that the dealers, because they lived up to the obligations of their contracts with Standard, were precluded from purchasing their "re-

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[101]See comment on this finding in the opening Statement, pages 25, 26 herein.

quirements" from Standard's competitors, and that this was the purpose and intent of the parties.

Something more in the way of findings of fact was required to support a conclusion of law that either the Sherman Act or the Clayton Act was violated.

Taking the findings as they stand, no violation of the Sherman Act is shown because there are no facts found showing that the "requirements" contracts were a restraint "*illegal per se*" and there is no finding that Standard had a specific intent "*to accomplish a forbidden restraint,*" *i. e.,* a specific intent "to unreasonably restrict the opportunities of competitors to market their product." (*United States v. Columbia Steel Co.,* 334 U. S. 495, 522, 524.) The "intent" paragraph of the findings [par. 31, R. 185] did not so find.

Taking the findings as they stand, no violation of the Clayton Act is shown because there is no finding that the "effect" of the contracts might be "to substantially lessen competition or tend to create a monopoly." The "effect" paragraph of the findings [par. 31, R. 185] did not so find. This finding simply declared that the "effect" of the contracts was to prevent the contracting dealers from handling competitive products. This finding could be made with reference to a multitude of perfectly legal contracts. Suppose that A, a supplier, makes a contract with B, a manufacturer, to sell B 1000 barrels of fuel oil for B's factory. To the extent that B's factory requirements are satisfied by the 1000 barrels, *the contract prevents B from buying competing fuel oil,* and the finding

which the District Court made in our case would be entirely appropriate.

It is no answer to this to say that other fact findings show (a) that there were "requirements" contracts with 5197 dealers, and (b) that a large dollar volume of products was handled annually thereunder. To say that these facts conclusively establish the ultimate fact—that the effect of the contracts was to substantially lessen competition or tend to create monopoly—is to say that "requirements" contracts, without more are forbidden *provided they affect a sizeable quantity.* This was not the purpose of the Clayton Act. In the thirty-four years since its enactment this Court has never suggested that size of operations *without more* spelled the difference between compliance therewith and violation thereof.

To determine whether the effect of the contracts was to substantially lessen competition or tend to create monopoly, further findings of fact were necessary—findings dealing with the entire competitive picture. It cannot be determined that competition was substantially lessened or monopoly threatened *solely because* Standard's competitors could not sell products to dealers with whom Standard had contracts during the life of such contracts. This determination must depend upon all factors which might affect the situation of these competitors. Findings with respect to these factors were not made.[102]

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[102]Error is specifically assigned. [R. 1870-1872.]

### (5) "Requirements" Contracts With California Dealers Are Not in Restraint of Interstate Commerce, and Are Not "in the Course of" Such Commerce, and Do Not Substantially "Affect" Such Commerce.

The District Court erred in concluding that such of the contracts as were made with *California dealers* restrained *interstate* commerce, or were made "in the course of" *interstate* commerce or had any substantial "effect" upon *interstate* commerce.[103]

Under sec. 1 of the Sherman Act the restraint must be upon *interstate* commerce.

Under sec. 3 of the Clayton Act the contracts must have been made "*in the course of*" *interstate* commerce,[104] and must have had the "effect" of substantially lessening competition or tending to create monopoly in a "line of [*interstate*] commerce."

Crude oil comes *solely* from California wells. [R. 223, 227.] It moves *solely* to California refineries. [R. 182.] Thence the refined products move in California to Cali-

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[103]Error is specifically assigned. [R. 1868, 1869.]

[104]*Lewis v. Shell Oil Co.*, 50 Fed. Supp. 547 (Ill. 1943), dealt with sec. 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C. 13a), which makes it unlawful for any person engaged in commerce "*in the course of such commerce*" to discriminate in price between different purchasers. The Court dismissed the complaint on the ground that the "requirements" contract in question, under which gasoline was delivered from Shell's bulk plant in Chicago (supplied from Indiana) to a Chicago dealer, was not within the purview of the Act. The Court said (p. 549): "However, there is a distinction between acts or transactions which merely affect commerce, and those which are actually performed in commerce. *It is those acts and transactions which are actually performed in commerce against which the Robinson-Patman Act is specifically directed, and nowhere does that Act refer to transactions which only affect commerce.*"

fornia bulk plants[105] and thence to dealers in California, or directly from the refinery to dealers in California. [R. 182, 183.]

Substantially all the tires, tubes and batteries which eventually go to California dealers, are acquired by Standard from factories and plants located in California; thence move to Standard's California warehouses located at San Francisco, Fresno and Los Angeles; thence move to the dealers in California. [R. 230, 1051, 975, 976.]

The contracts with the California dealers[106] are made in California [R. 247], and, as previously indicated, the products supplied thereunder move to the California dealer within California.

*Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 (1899), is in point under the Sherman Act. There a decree enjoining certain defendants engaged in the manufacture and sale of cast iron pipe from combining to enhance prices by eliminating competitive bidding in the sale of such pipe, was affirmed. But in the course of the opinion it was said (p. 247):

> "In one aspect, however, that *judgment is too broad in its terms*—the injunction is too absolute in its directions—*as it may be construed as applying equally to commerce wholly within a State as well as to that which is interstate or international only.* This was probably an inadvertence merely. Although the ju-

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[105] A few bulk plants located just over the California line in other states make deliveries of Standard's petroleum products to dealers in California, but these deliveries are relatively insignificant, being a very small fraction of 1% of Standard's California distribution. [R. 1027, 975, 976.]

[106] Standard sold to 2354 California dealers under some form of writing and to 429 California dealers without any writing, or a total of 2783. [R. 1315, 1316, 212.]

risdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. *It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate.* The latter it can regulate, while the former is subject alone to the jurisdiction of the State. The combination herein described covers both commerce which is wholly within a State and also that which is interstate.

"*In regard to such of these defendants as might reside and carry on business in the same State where the pipe provided for in any particular contract was to be delivered, the sale, transportation and delivery of the pipe by them under that contract would be a transaction wholly within the State, and the statute would not be applicable to them in that case.* They might make any combination they chose with reference to the proposed contract, although it should happen that some non-resident of the State eventually obtained it.

* * * * * * * *

"To the extent that the present decree includes in its scope the enjoining of defendants thus situated from combining in regard to contracts for selling pipe in their own State, it is modified, and limited to that portion of the combination or agreement which is interstate in its character."

To the same effect, see *Small Co. v. Lamborn & Co.*, 267 U. S. 248 (1925).

*United Shoe Machinery Co. v. United States*, 258 U. S. 451 (1922), is in point under the Clayton Act. There it was said (p. 465):

> "It is insisted that the leases in controversy were not made *in the course of interstate commerce*, and, therefore, cannot be embraced within the terms of the Clayton Act. It is provided in the decree that it shall apply to all leases covering shoe machinery shipped from one State to the user or factory for use in another State in the course of or as a part of the transaction between the lessor and the lessee, resulting in the making of the lease. It is true that the mere making of the lease of the machines is not of itself interstate commerce. But where, connected with the making of such lease, a movement of goods in interstate commerce is required, we have no doubt of the authority and purpose of Congress to control the making of such leases by the enactment of the statute before us."

There was no evidence that a "movement of goods in interstate commerce" was contemplated or required or actually occurred in connection with any of the "requirements" contracts made with dealers located *in California*.

"The judgment of the District Court should have excepted from its operation contracts made between Standard and dealers located *in California*. As to these, the District Court was without jurisdiction.

## CONCLUSION.

The case presented is one where the District Court patently and avowedly applied what we have called the "appreciable segment" of commerce theory. It erred in so doing. Because of this error it excluded material evidence, and gave no weight to and made no findings concerning material evidence which was admitted. It should have decided the case upon a correct theory—what we have called the "detriment to the public interest" theory. This would have required it to weigh the factors which it thus disregarded. Appellants were entitled to have these factors weighed by the trier of fact.

It cannot be said that if the trier of fact had applied the correct theory and given weight to these factors, no decision favorable to Standard could reasonably have resulted.[107] Even if we leave out of account matters sought to be introduced but which were excluded, and take simply the uncontradicted facts disclosed by the record, these demonstrate that there was no violation of either the Sherman Act or the Clayton Act.

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[107] While this Court has said that it will not disturb a judgment for error which does not work injury, it has also said that "it is well settled that a reversal will be directed unless it appears, *beyond doubt*, that the error complained of did not and could not have prejudiced the rights of the party" (*Vicksburg & Meridian Railr'd. v. O'Brien*, 119 U. S. 99, 103); that whenever affirmance is sought because the error was not injurious, "*it must appear so clear as to be beyond doubt* that the error did not and could not have prejudiced the party's rights." (*Deery v. Cray*, 5 Wall. 795, 807.)

It is respectfully submitted that the judgment of the District Court should be reversed with directions to enter a judgment in favor of appellants.

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be reversed with directions to enter
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ALL,

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948.

No. 279.

STANDARD OIL COMPANY OF CALIFORNIA AND STANDARD STATIONS, INC., *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the District Court of the United States for the Southern District of California.

## REPLY BRIEF OF APPELLANTS, STANDARD OIL COMPANY OF CALIFORNIA AND STANDARD STATIONS, INC.

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IN THE

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No. 279.

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STANDARD OIL COMPANY OF CALIFORNIA AND STANDARD STATIONS, INC., *Appellants*,

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**Appeal from the District Court of the United States for the Southern District of California.**

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## REPLY BRIEF OF APPELLANTS, STANDARD OIL COMPANY OF CALIFORNIA AND STANDARD STATIONS, INC.

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Appellants, Standard Oil Company of California and Standard Stations, Inc., present the following reply brief.[1]

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[1] Herein appellee will sometimes be referred to as "the government;" and appellant Standard Oil Company of California as "Standard". References to pages of the transcript of record are designated: R. References to Appellants' Brief are to the opening brief of appellants heretofore filed herein. References to the Brief for the United States are designated: Govt. Br. Italics throughout this brief have been supplied.

## I.

### The Government's "Foreclose-Competitors-From-Any-Substantial-Market" Argument Would Strike Down a Multitude of Contracts Underlying the Nation's Industrial and Commercial Structure.

Every contract for the future sale of goods excludes competitors from the market—in the sense that the government contends Standard's "requirements" contracts exclude competitors of Standard.

If such contract embraces a *substantial* quantity it excludes from a *substantial* market—in the sense that the government contends that Standard's competitors are excluded from a *substantial* market.

Yet certainly every contract for the future sale of a substantial quantity which contemplates a movement of goods in interstate commerce cannot be condemned by the Act.

A contract by which a steel company agrees to furnish over a three year period the steel "requirements" of a motor car manufacturer or a large specified quantity of steel for such manufacturer (to now employ the phraseology of government counsel) "destroys the opportunity" of other sellers of steel to sell such motor car manufacturer the steel thus contracted for, and deprives the motor car manufacturer of the "right to buy" such steel from competitors of the contracting seller. The substantial part of of the market represented by the motor car manufacturer's contract commitments is "fenced off" and for three years "closed" to the steel company's competitors.

But such contract is not illegal even though the quantity embraced thereby is *very substantial* and a movement of goods in interstate commerce is contemplated.

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[2] This phrase appears in the *International Salt* case (332 U. S. at 396) and again in the *Griffith* case (334 U. S. at 107), but is there used to condemn monopoly power used as a leverage to enlarge an existing patent monopoly or exact special privileges not enjoyed by competitors.

Suppose that in our case Standard, instead of making "requirements" contracts with dealers, had made with each of 4,000 dealers a contract to sell such dealer 20,000 gallons of its gasoline, deliveries to be made over a period of one year. This would amount to a total annual quantity of 80,000,000 gallons of gasoline and a total annual dollar volume of $14,000,000.[3] Implicit in such contracts would be at least an "understanding" that such dealers would not buy 80,000,000 gallons of gasoline from Standard's competitors. Would this be a substantial "captive" market (Govt. Br. 25, 27) from which Standard's competitors would be "shut away"? All the arguments which the government now levels at Standard in our case could be employed in the case thus supposed. No logical line of demarcation separates the one from the other. Yet if the case thus supposed violates the law, the practices of industry and commerce nationwide must undergo extensive alteration.

Obviously the broad generalizations of the government's brief—such generalizations as: "it is also unlawful to exclude from the market any of those who supply it . . ." (Govt. Br. 25, 26); "freedom of trade includes unrestricted access to the market" (Govt. Br. 26); "agreements which fence off a substantial segment of the market . . . impinge upon the right of freedom of trade . . ." (Govt. Br. 26); and "stifle competition by denying competitors less favorably situated access to the market" (Govt. Br. 30, 31)—may not be applied to condemn the contracts here involved unless a multitude of contracts all over the country and heretofore regarded as valid are likewise to be condemned.

Under the rule contended for by the government *all* "requirements" contracts for the future supply of goods in interstate commerce would be illegal, provided they em-

[3] Assuming a price of 18¢ per gallon, this being the assumption employed by the government in arriving at the dollar volume of Standard's gasoline sales. (R. 820)

braced a *substantial* quantity. The same would be true of all contracts for the future supply of a *substantial* and definite quantity of goods in interstate commerce where the proof showed that such definite quantity was in fact the buyer's requirements *for any period.* The same would be true of all contracts for the future supply of a *substantial* and definite quantity of goods in interstate commerce which was less than the buyer's requirements, for such contracts are as instrumental as "requirements" contracts in excluding competitors from the "market" represented by the quantity for which the buyer has contracted.

So, in this case, it is submitted that there is no *unlawful* exclusion of competitors from the market *simply by virtue of the fact* that Standard makes "requirements" contracts with a large number of dealers for *substantial* quantities.

Moreover, in this case, there is in fact no exclusion of competitors from the market in the sense that Standard's competitors are prevented from freely competing with Standard in an endeavor to obtain contracts with dealers. In every instance, Standard's competitors *freely compete* with Standard to induce the dealer to execute a supply contract. Frequently such competitors are successful in obtaining a contract with the dealer to the exclusion of Standard (R. 1068). Standard does not and cannot execute any such contract with a dealer except in fair and open competition with its competitors. In such competition for the patronage of the dealer Standard has no unlawful competitive advantage, and Standard's competitors have "unrestricted access to the market."

The foregoing points to the futility of the government's attempt to identify Standard's "requirements" contracts with a boycott. (Govt. Br. 27) In a boycott the parties by concert of action enforce non-dealing and usually seek to prevail upon others to do likewise. In this case there is no evidence whatever of concert of action between Standard

and any of its competitors. On the contrary, as pointed out above and in Appellants' Brief, p. 93 et seq. there is aggressive competition between Standard and its competitors. Nor is there any concert of action between Standard and the dealers to exclude Standard's competitors. If, as pointed out above, competition is in a sense lessened by the contracts themselves, it is no more than that lessening of competition which always occurs whenever one seller is successful in the competitive struggle in inducing the buyer to finally say that he will buy such seller's goods. Competition is itself a "conflict for advantage" (*United States* v. *American Linseed Oil Co.*, 262 U. S. 371, 388). One of the competing parties must eventually be successful—otherwise there is no such thing as competition. The lessening of competition brought about by the "requirements" contracts is not an *unlawful* lessening of competition.

It is true that Standard will not sell gasoline or tires or tubes or batteries or accessories to a dealer who handles a competitive gasoline.[4] But this is not a boycott, nor is it unlawful. This Court in *United States* v. *Colgate & Co.*, 250 U. S. 300, said (p. 307):

> "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."

The government adverts (Govt. Br. 29, 30) to the finding (R. 181) which states that Standard "persuaded, induced, and influenced" dealers to enter into "requirements" contracts by lending the dealer money without interest or at

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[4] It will and does sell lubricating oil to a dealer who handles competitive products including competitive gasoline. (R. 1074)

rates of interest below current rates; by making loans, portions of which were later forgiven; by making gifts of money; by buying equipment from the dealer and thereafter furnishing new equipment without charge; or by selling equipment to the dealer at less than cost. The government states (Govt. Br. 15) that our assignment of error to this finding is "in flat contradiction of the admission of" Standard's answer. But such answer (R. 94) admitted only that Standard had employed these methods "*in the past*" and "*in order to meet the competition*" of defendants' competitors who were employing the same methods and offering like or similar benefits to operators; averred that there had been no giving of money or forgiving of loans subsequent to May 1, 1946 and that this had occurred only "*in rare instances*" prior thereto; admitted that "in certain cases" these benefits may have been "one of the reasons why the operator entered into a contract, but that in many . . . cases said benefit was accorded the operator for the purpose of promoting his sales, or for some other reason quite apart from the making of any contract or lease." All else in the complaint pertaining to this was denied. Obviously such admissions as are embodied in the answer are not at all in conformity with paragraph 22 of the findings (R. 181) and the error assigned to the latter is by no means a "contradiction" of admissions in the answer.

The rarity of these practices is demonstrated by the testimony. Mr. McClanahan, Standard's vice president in charge of sales, testified that "*several dealers*" may have been assisted financially, but that "*we just don't make gifts to anybody*" (R. 250). When his attention was called to one specific case of financial assistance to a dealer, and he was asked if this was the kind of thing that happened frequently, he replied, "Not frequently. *Very infrequently*" (R. 253). He also testified that the total number of loans to dealers, "*would amount to very few in number*" (R. 254.

277). Nothing elsewhere in the record disputes Mr. McClanahan's testimony as to the rarity of these practices. Moreover, the District Court's finding does not state the number of instances in which these "inducements" were employed or that such instances were numerous (R. 181).[5]

These "inducements" occurred only in very rare instances. It is believed that the record will disclose only six or seven such instances. (See Exhs. 16-17-18-19-20 and 21. R. 1326, 1342, 1385, 1389, 1394C, 1405.)

*The complaint did not seek any injunction restraining these so-called "inducements"* (R. 1, 11). *They were not enjoined by the judgment* (R. 188).

## II.

**Exclusive Dealing Contracts, Even Though They Involve Substantial Quantities and Value, Are Not Illegal Unless They Seek to Enlarge an Existing Monopoly, or Are a Calculated Scheme to Gain Control of the Market and to Restrain or Suppress Competition, Rather Than to Advance Legitimate Business Needs, or Unless They Unreasonably Restrict the Opportunities of Competitors to Market Their Product.**

The government says that Standard's "requirements" contracts are illegal because they "*destroy the opportunity of other sellers of similar products to compete for the patronage*" *of the outlets* (Govt. Br. 25).

But certainly it is now clearly established that exclusive dealing contracts are not illegal *without "something" more.*

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[5] The finding (par. 22, R. 181) states that defendants have persuaded, induced and influenced dealers to enter into "the various written and oral agreements *described in Paragraphs 11-15, 17 and 18 herein* by various means and methods", etc. This does not say "all" agreements and the paragraphs referred to, viz., 11-15, 17 and 18 *are not the paragraphs which refer to the numbers of the several contracts outstanding.*

This was the Court's pronouncement in the *Columbia Steel* case (334 U. S. 495 at 523, 524).[6]

This was pointed out in the *Yellow Cab* case (332 U. S. 218).[7]

This was stated in the *Paramount Pictures* case (334 U. S. 131 at 173, 174) where the Court was referring to exclusive dealing brought about by vertical integration.

What is the "something" which must be added to exclusive dealing to make it illegal?

Certainly it is not magnitude or volume of operations. The decision in the *Columbia Steel* case (334 U. S. 495) refutes the idea that it is magnitude or volume which makes exclusive dealing illegal. There U. S. Steel lawfully acquired the exclusive business of Consolidated Steel, "the largest independent steel fabricator on the West Coast" (p. 498), and by so doing obtained the *exclusive right for all time to come* of supplying a "market" amounting to $5,000,000 annually (p. 537).

The decision in the *Yellow Cab* case (332 U. S. 218) refutes the idea that it is magnitude or volume which makes exclusive dealing illegal. There it was indicated that Parmelee might lawfully make exclusive dealing contracts

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[6] Therein this Court said (334 U. S. 495 at 524):

> "Exclusive dealings for rolled steel between Consolidated and United States Steel, brought about by vertical integration *or otherwise*, are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product."

[7] Therein Parmelee had exclusive contracts with the railroads entering Chicago to transport passengers between railroad stations. This Court said (332 U. S. 218 at 229):

> "It is true, of course, that *exclusive contracts* for the transportation service in question are not illegal."

It is then pointed out that these contracts between Parmelee and the railroads became illegal *only because of the allegation that the other cab companies in Chicago had agreed with Parmelee that Parmelee alone should provide this service.*

with the railroads, provided it did not *agree with its competitors* that it (Parmelee) should have this business and its competitors should not have it (332 U. S. at 229). The volume of dealing under these contracts between Parmelee and the railroads must be very large.

The decision in the *Sinclair* case (261 U. S. 463) refutes the idea that it is magnitude or volume which makes exclusive dealing illegal. In that case Sinclair lawfully made exclusive dealing contracts with gasoline dealers, and the volume of dealing under these contracts must have been very large for Sinclair was a large oil company and its operations were widespread.[8]

The decision in the *Pick* case (299 U. S. 3) refutes the idea that it is magnitude or volume which makes exclusive dealing illegal. Therein exclusive dealing contracts between General Motors and its dealers were approved, although in view of the size of General Motors these contracts doubtless were numerous and involved a large dollar volume of products.

Searching for the "something" in addition to magnitude or volume which will make exclusive dealing contracts illegal, we find the following:

(A) Exclusive dealing contracts will be held illegal if they are a means by which an existing monopoly is enlarged. (See Appellants' Brief, p. 99 et seq.) Typical of this is the *International Salt* case (332 U. S. 329)—a "tying-clause" case which declares it to be illegal for the owner of an article monopolized by patent to attempt to extend such patent monopoly by requiring the lessee of the patented article to purchase from the owner of the patent non-patented articles for use in connection with the patented ar-

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[8] Neither the findings of the Federal Trade Commission nor the decisions in the Circuit Court of Appeals or the Supreme Court indicate the *number* of contracts involved or the *volume* handled thereunder.

ticle.[9] *But in our case Standard has no monopoly, patent or otherwise.*

(B) Exclusive dealing contracts will be held illegal if they are "*a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs.*" This is the pronouncement (with respect to exclusive dealing brought about by vertical integration) in the *Paramount Pictures* case (334 U. S. 131 at 174). *But in our case there was no such scheme, and the "requirements" contracts were a normal expansion to meet legitimate business needs.*

(C) Exclusive dealing contracts will be held illegal if their effect was "*to unreasonably restrict the opportunities of competitors to market their product*". This is the pronouncement in the *Columbia Steel* case (334 U. S. 495, 524). *But in our case the "requirements" contracts did not unreasonably restrict the opportunities of competitors to market their product.* (See Appellants' Brief, p. 87 et seq.)

## III.

**The District Court Did Not Find or Weigh the Factors Which Would Have Demonstrated That Standard Did Not Exert Monopoly Power, and Had Not Perpetrated a Calculated Scheme to Gain Control of a Market and to Restrain or Suppress Competition, and Had Not Unreasonably Restricted the Opportunities of Its Competitors to Market Their Product. Instead It Predicated Its Conclusions Solely on the Magnitude and Volume of Standard's Operations.**

The government does not dispute the fact (elaborated under Point I of Appellants' Brief, p. 40 et seq.) that the District Court, in reaching its conclusions adverse to Standard, disregarded everything except (a) the "require-

[9] To like effect are *United Shoe Machinery Corp. v. United States*, 258 U. S. 451 and *International Business Machines Corp. v. United States*, 298 U. S. 131.

ments" contracts, (b) the number of dealers under such contracts, and (c) the volume of business handled thereunder. The District Court did not weigh or make findings with respect to other relevant factors and it shut out evidence relevant thereto (Appellants' Brief, p. 40 et seq. and p. 110 et seq.). The government seeks to support this position.

Certainly, to determine whether the *intent* of the "requirements" contracts was "a calculated scheme to gain control . . . and to restrain or suppress competition, rather than an expansion to meet legitimate business needs", or to determine whether the *effect* of such contracts was to "unreasonably restrict the opportunities of competitors to market their product", the District Court as a trier of fact was required to (a) *receive the evidence which it excluded* as to what the "effect" of the elimination of the "requirements" clauses would be on competition and the over-all competitive picture, and (b) *make findings and weigh* "the facts peculiar to the business . . .: its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable," (*Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238); "the economic conditions peculiar to the . . . industry, . . . and the probable consequences of the carrying out of that plan in relation to market prices and *other matters affecting the public interest* . . ." (*Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 361); and was required to give heed to the clear pronouncement of this Court in the *Columbia Steel* case (334 U. S. 495 at 527) that

> "In determining what constitutes unreasonable restraint, *we do not think the dollar volume is in itself of compelling significance;* we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, *and other characteristics of the market.*"

*This was exactly what the District Court did not do.*

The District Court ignored the basic requirements of the "rule of reason"—that *all the facts* of the particular case shall be considered and *weighed* by the *trier of fact* for the purpose of determining whether the practices complained of will *prejudice the public interest.* (See Appellants' Brief, p. 53 et seq.)

## IV.

### Appellants Have Not Admitted by the Pleadings or Otherwise That the "Effect" of the "Requirements" Contracts May be to "Substantially Lessen Competition" as That Term is Used in Sec. 3 of the Clayton Act.

Confronted with the results of nine years of operation under the "requirements" contracts—results which demonstrate that the practices complained of produce no substantial lessening of competition (see Appellants' Brief, p. 93 et seq.); government counsel now seek to invoke what is said to be an admission by defendants' answer that the "effect" of the contracts may be to substantially lessen competition (Govt. Br. 46). This admission, they say, is found in the Fifth affirmative defense in defendants' answer.

The Fifth affirmative defense (R. 96) in defendants' answer pleads that the "application and enforcement" of the antitrust acts sought herein was and is inequitable and violative of Constitutional guarantees in that Standard's contracts are alleged to violate the law and are sought to be declared void while numerous other existing contracts made by competitors of like or similar content are not attacked or sought to be enjoined and "*will not be legally attacked or sought to be enjoined by plaintiff*, by reason whereof a decree herein as prayed by plaintiff" would enable Standard's competitors to contract with Standard's existing and prospective customers upon terms which would be denied Standard, with the result that Standard would be deprived

of the custom and patronage of such customers, etc. It is the last part of this which the government contends is an admission that the "requirements" contracts have the effect of "excluding from the market" competitors who do not use such contracts, and that the effect of the contracts may be to substantially lessen competition.

No proof was offered to support this Fifth defense and no finding was made with respect thereto.

Obviously, if Standard could have proved that the Department of Justice would not attack and thus place the blessing of legality upon "requirements" contracts of Standard's competitors while at the same time enjoining the use of Standard's "requirements" contracts, there would be something queer about the situation. But unless the Department of Justice is prepared to concede the factual truth of the allegation of this Fifth defense (italicized above) that it (the government) will not legally attack or seek to enjoin use of "requirements" contracts by Standard's competitors, it should not be heard to urge that other allegations of this Fifth defense are factual admissions on the part of Standard. And if the Department of Justice is prepared to concede that "requirements" contracts in the hands of Standard's competitors will not be attacked or enjoined, this is a concession that "requirements" contracts generally are legal, for the Department of Justice is bound to enforce the law and take steps to enjoin contracts which violate the antitrust laws.

So if this Fifth defense is to be taken as a factual admission for the purpose of this lawsuit, let us take all of it as a factual admission. If so, in view of the presumption that the law will be obeyed by the Department of Justice, we have a clean cut factual admission by the government that "requirements" contracts do not violate the antitrust laws.

*Of course, the truth is that none of this Fifth defense may be used as an admission either against Standard or against the government.*

All of the allegations of the complaint that the effect of the "requirements" contracts was to exclude competitors from the market or substantially lessen competition were denied by the answer (see par. 34 of the complaint, R. 10, denied by par. 25 of the answer, R. 95).

Defendants were entitled to plead *inconsistent affirmative* defenses.[10]

Obviously, therefore, an admission in one affirmative defense cannot be taken as an admission in the case. If the rule were otherwise and all the allegations of inconsistent affirmative defenses were taken as admissions in the case, how would it be possible to draft consistent findings? The findings would either be at variance with certain of the admissions in certain affirmative defenses, or the findings would be hopelessly conflicting.

The authorities support the foregoing conclusions.

> *Glenn* v. *Sumner*, 132 U. S. 152, 157
> *Banque de France* v. *Chase Nat. Bank*, 60 Fed. (2d) 703, 708 (C. C. A. 2)
> *United States* v. *Stephanidis*, 47 Fed. (2d) 554, 555 (C. C. A. 2)

In the case last cited it was said (p. 555)

> "It is true that appellee's separate defense setting up a breach of warranty admits that title to the vessel passed to the purchaser, and is inconsistent with its general denials; *but no contention has been, or could be, made that inconsistent defenses may not be raised in separate pleas, or that an admission in one plea may be used by a plaintiff to prove his case against a different plea which denies it*." [citing Glenn v. Sumner, supra.]

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[10] "* * * A party may also state as many separate claims or defenses as he has *regardless of consistency* and whether based on legal or on equitable grounds or on both. * * *" Rule 8(e)(2) Federal Rules of Civil Procedure.

Appellants respectfully submit that the judgment of t
District Court should be reversed with directions to ent
judgment in favor of appellants.

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# BRIEF for the U.S.

No. 279

# In the Supreme Court of the United States

October Term, 1948

Standard Oil Company of California and Standard Stations, Inc., appellants

*v.*

The United States of America

*On appeal from the United States District Court for the Southern District of California, Central Division*

**BRIEF FOR THE UNITED STATES**

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No. 279

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*v.*

THE UNITED STATES OF AMERICA

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION*

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the District Court for the Southern District of California, Central Division (R. 99-137), and its supplemental opinion rendered on appellants' motion to reconsider (R. 158-167), are reported, respectively, in 78 F. Supp. 850 and 875.

## JURISDICTION

The district court entered judgment for appellee on June 30, 1948 (R. 188-194; reported in 78 F. Supp. 889). The petition for appeal was filed on July 20, 1948, and was allowed the same day (R. 1876). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as last amended by Section 17 of the Act of June 25, 1948, Pub. Law 773, 80th Cong., 2d Sess., 15 U. S. C. 29. Probable jurisdiction was noted on October 19, 1948 (R. 1947).

## QUESTIONS PRESENTED

1. Whether the trial court correctly concluded that the foreclosure of competing suppliers from 6000 retail dealer outlets (approximately one-sixth of the total number in the seven States of the Western area) selling annually $66,000,000 worth of petroleum products and automotive accessories, and the denial to those dealer outlets of access to a competitive market, by exclusive dealing contracts between those dealer outlets and the appellants (suppliers of 23% of the gasoline marketed in those States) constitutes an unreasonable restraint of trade condemned by Section 1 of the Sherman Act.

2. Whether the trial court correctly concluded that the effect of these exclusive dealing contracts substantially lessens competition and tends to create a monopoly in violation of Section 3 of the Clayton Act.

3. Whether the trial court correctly concluded that it had jurisdiction to enjoin the intrastate use of exclusive dealing agreements on finding that their effect was to restrain interstate commerce.

STATUTES INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> Section 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . [15 U.S.C. 1].
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> Section 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of the act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. . . . [15 U. S. C. 4].

The Act of October 15, 1914, 38 Stat. 730, known as the Clayton Act, provides in part as follows:

> Section 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise,

machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. [15 U. S. C. 14]

STATEMENT

The United States brought suit against Standard Oil Company of California and its wholly owned subsidiary, Standard Stations, Inc., asking that the exclusive supply provisions of some 8,000 agreements entered into by them with approximately 6,000 independent service stations be declared violative of Section 1 of the Sherman Act and Section 3 of the Clayton Act, and that the further use of agreements containing these or similar provisions be enjoined. Following trial of the cause on the merits the district court adjudged the provisions illegal and void, and granted the relief prayed for by the Government.

The existence, number, and contents of the written agreements are not in controversy. Only their effect is in question. The issues involved are, therefore, almost exclusively legal in character. The Government accepts in their entirety the district court's findings of fact (R. 168-185; reported, 78 F. Supp. 879-888). Appellants challenge the correctness of the findings made in minor particulars only.[1] The recital of facts which follows is based upon the findings rendered by the district court, with their supporting evidence, and upon undisputed evidence.

Appellant Standard Oil Company of California is a Delaware corporation with its principal place of business in San Francisco. It produces and refines petroleum products in California, and transports, distributes and markets such products in California, Arizona, Washington, Idaho, Nevada, Utah and Oregon, which represent what the district court called the Western area (Fdg. 2, R. 168, 169). Appellant Standard refines gasoline at refineries at Richmond, El Segundo and Segura, all in California. It purchases gasoline from Utah Oil Refining Company, Salt Lake City, Utah, for dis-

[1] Appellants contend that the court should have made additional findings, and, of course, they challenge such ultimate findings as, e.g., that the agreements constitute an unreasonable restraint on interstate commerce. But, in respect to evidentiary findings or findings not broadly interwoven with legal conclusions, appellants' objections are insignificant. See Appellants' Assignment of Error 3 (R. 1869).

tribution and sale in parts of Utah and Idaho, and from Standard Oil Company of Texas for distribution and sale in parts of Arizona. (Fdg. 24, R. 182.) It also purchases from various concerns, and distributes and sells a line of tires, batteries, and automotive accessories, a majority of which bears the Atlas brand name (Fdg. 28, R. 183; Fdg. 12, R. 173).[2]

Appellant Standard Stations, Inc., also a Delaware corporation with its principal place of business in San Francisco, is a wholly owned subsidiary of Standard, and manages and operates service stations in the Western area (Fdg. 3, R. 169).

Appellant Standard is the largest single marketer of gasoline through retail outlets in the majority of states in the Western area (Fdg. 25, R. 182). In addition to its sales through retail outlets it makes industrial sales (App. Br.[3] 25). Appellant Standard's total sales of gasoline in 1946 amounted to 23% of the total taxable gallonage sold in the seven-state Western area (Fdg. 25, R. 182).

Early in 1947 there were in the Western area 36,500 retail gasoline outlets, including both the independent dealer-operated stations and the com-

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[2] "Automotive accessories" as used in the Findings of Fact by the court below refers to replacement parts and articles other than petroleum products used in servicing automotive vehicles and includes tires, tubes, batteries, spark plugs, oil filters, oil filter cartridges, fan belts, battery cables, auto lamp bulbs, fuses, windshield wipers and blades, tire repair and vulcanizing kits, anti-freeze preparations, tire chains, waxes and polishes and other light items (Fdg. 5 (D), R. 170).

[3] App. Br. refers to Appellants' Brief.

pany-operated stations of appellants and of other gasoline suppliers (App. Br. 20, R. 1061-2, 1763-1777, 1064). Appellants owned and operated 1063 or 3% of these outlets (R. 101, App. Br. 10).[4] 5937, representing 16%, of the total outlets were operated by dealers subject to exclusive dealing agreements with appellants (Fdg. 19, R. 179).

Appellants had 7887 exclusive-dealing agreements covering the 5937 outlets. Some dealers were parties to more than one type of agreement. (Fdgs. 16 and 17, R. 179).

These agreements were divided into seven types, five written and two oral. Under their terms all 5937 of the outlets are forbidden to handle competitors' gasoline (Fdgs. 11-17, R. 172-179). More than 7000 of the agreements, all but 742, forbid handling competitive petroleum products of any sort (Fdgs. 1117, R. 172-179). In addition 2777 of these 7000 forbid handling competitive tires, tubes or batteries (Fdg. 16, R. 179; Fdg. 12, R. 173-174; Fdg. 14, R. 176-177). An unknown number of the outlets bound by the last mentioned 2777 agreements are still further prohibited by oral agreements with the appellants from handling other competitive automotive accessories (Fdg. 18, R. 179).

The outlets covered by agreements purchased from appellants $66,000,000 worth of gasoline,

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[4] See the district court's opinion at R. 101. There is no issue as to appellants' direct operation of service stations.

tires, tubes, batteries and other accessories in 1947. The following table details both the quantity volume and the approximate dollar volume of business done by the appellants and these outlets for that year and the year preceding it (Fdg. 20, R. 180).

| | 1946 Quantity Volume | 1946 Dollar Volume | 1947 Quantity Volume | 1947 Dollar Volume |
|---|---|---|---|---|
| Gasoline | 268,568,748 gal. | $48,342,374 | 320,257,350 gal. | $57,646,323 |
| Lubricating Oils | 6,067,782 gal. | 3,246,263 | 6,268,206 gal. | 3,353,490 |
| Tires | 179,462 units | | 213,304 units | |
| Tires and tubes | | 2,692,094 | | 3,188,301 |
| Tubes | 138,174 units | | 197,400 units | |
| Batteries | 43,078 units | 352,464 | 63,126 units | 669,829 |
| Miscellaneous Accessories | 2,375,162 units | 687,557 | 2,526,114 units | 988,469 |
| | | $55,320,752 | | $65,846,412 |

Appellants' sales of gasoline through dealers constituted 6.7% of the total taxable gallonage sold in 1946 in the Western area (R. 122, App. Br. 25). Appellants' company-operated service stations' sales in 1946 constituted 6.8% of the total taxable gallonage sold in the area (R. 122, App. Br. 25). Combining the percentage sold under agreements with the percentage sold in company-operated stations, appellants' retail sales amounted to 13.5% of the total sales in the area in that year. Taking their industrial sales into consideration, appellants' full percentage of the gasoline market in the area in 1946 was 23%. (Fdg. 25, R. 182, App. Br. 25).

Under the appellants' exclusive agreements and sales practices practically all sales of other products produced or sponsored by appellants were tied into gasoline sales. All but 742 of appellants'

agreements forbidding purchases of competitors' gasoline also forbid purchases of competitors' other petroleum products (Fdgs. 11-17, R. 172-179). Appellants dealer sales in 1946 of lubricating oil were 5% of the total taxable sales in that area (App. Br. 27). Adding sales by appellants' company-operated stations the percentage becomes 8.8% of that total (App. Br. 31). 2777 of the 7000 such gasoline and oil agreements prohibit the sale of competitors' tires, tubes or batteries (Fdg. 16, R. 179; Fdg. 12, R. 173-174; Fdg. 14, R. 176-177). Furthermore, appellants sell no tires, or batteries to a dealer unless the dealer ~~(Fdg. 16, R. 179; Fdg. 12, R. 173-174; Fdg.~~ signs what is called a Dealer Agreement-TBA which restricts him not only as to tires, tubes and batteries, but as to gasoline and petroleum products as well (R. 1075, App. Br. 17, R. 176-177). Appellants' dealer sales of tires within the Western area in 1946 were 2% of total replacement tire shipments in the area (R. 123, App. Br. 27). Adding here the sales of appellants' company-operated stations the percentage becomes 3.9% (R. 123). Appellants' dealer sales of batteries in the Western area in 1946 were 1.8% of total replacement battery sales in the area (R. 123, App. Br. 28). Adding the sales of appellants' company-operated stations the percentage total is 4.6% (R. 123). Appellants will sell automobile accessories other than tires, tubes and batteries only to dealers who sell appellants' gasoline (R. 1075, App.

Br. 17). As we have said, a number of outlets who are bound by agreements to purchase no competitor's petroleum products, tires, tubes, or batteries, are still further bound by oral agreements to handle no competitor's other automotive accessories unless appellants are unable to furnish them (Fdg. 18, R. 179). There are no satisfactory figures for comparison of accessory sales.

Appellants' six major competitors have adopted similar exclusive-dealing programs (App. Br. 22-23). These six majors distribute through 20,502 dealer outlets and 383 company-operated outlets (App. Br. 20). Adding appellants' 5937 dealer outlets and 1063 company-operated outlets, they together with these six other majors distribute through 27,885, or 76%, of the total 36,500 retail gasoline outlets in the Western area (Fdg. 19, R. 179, 101, 1061-2, 1763-1777, 1064, App. Br. 20). These six companies together with appellants, the largest of all, now share 55% of the total taxable gasoline gallonage sold in the Western area in their sales through dealer-operated and company-operated retail outlets alone.[5]

The pertinent terms of the five types of written agreements currently used by appellants are:[6]

[5] Appellants' six major competitors sold through retail outlets 1,709,874,556 gallons. Appellants sold through retail outlets 542,467,000 gallons. The total 2,252,341,556 represents 55.98% of the total taxable gallonage sold in the area. (App. Br. 20, 25, R. 123).

Adding only appellants' industrial sales, the figure is more than 63% (R. 182, App. Br. 25). The record does not show the industrial sales of the six other majors.

[6] Figures on the number of agreements are based on chart dated March 12, 1947 (Fdg. 16, R. 179).

Dealer Agreement (Fdg. 11, R. 172): [7]

* * * Dealer agrees to buy from [Standard], all of Dealer's requirements of petroleum products used or sold or bought to be used or sold by Dealer at ———. The petroleum products to meet Dealer's requirements hereunder shall be those brands of gasoline, lubricating oils, and other petroleum products sold by [Standard] to its dealers generally in Dealer's vicinity.

Distributor Agreement (Fdg. 12, R. 173): [8]

Company [i. e., Standard] agrees to sell to Distributor, and Distributor agrees to buy from Company and stock and offer for sale all of Distributor's requirements of petroleum products used or sold or bought to be used or sold by Distributor in the conduct of his business on the premises hereinafter described. The petroleum products to meet Distributor's requirements hereunder shall be those brands of gasoline, lubricating oils and other petroleum products currently sold at service stations operated by Standard Stations, Inc., in Distributor's vicinity, and Distributor agrees not to store, handle, distribute, or sell any other brand or brands of petroleum products at or from the stations.

* * * * * *

[7] Appellants have 1,656 agreements with independent dealers in the form of the Dealer Agreement (Fdg. 16, R. 178; Govt. Ex. 1, R. 1301). This form of agreement came into use about 1938 (Fdg. 9, R. 171).

[8] Appellants have 556 agreements with independent dealers in the form of their Distributor Agreement (Fdg. 16, R. 178; Govt. Ex. 2, R. 1304). Agreements in this form came into use about 1934, and since 1944 have been gradually replaced and superseded by other forms of agreement (Fdg. 8-9, R. 171).

Company agrees to sell or consign to Distributor and Distributor agrees to purchase or receive from Company, and stock and offer for sale, all of Distributor's requirements of tires, tubes, and batteries used or sold or bought to be used or sold by Distributor on the premises above described. The tires, tubes and batteries to be supplied Distributor hereunder shall be Company's regular line of Atlas Tires, Atlas Tubes and Atlas Batteries currently sold at service stations operated by Company in Distributor's vicinity. Company will deliver to Distributor such other Atlas merchandise currently sold by Company at service stations operated by Standard Stations, Inc., that Distributor wishes to handle hereunder, in quantities necessary in opinion of Company to meet the station's trade requirements. Whether tires, tubes, batteries and other non-petroleum merchandise which Distributor handles hereunder shall be consigned or sold to Distributor shall depend on Company's current policies, but Company will allow Distributor the commissions or the equivalent thereof in differentials below Company's selling price therefor, as set forth in the attached schedule marked Schedule 'A' and hereby made a part hereof. This schedule may be modified from time to time by Company. All tires, tubes, and batteries sold or consigned to Distributor hereunder shall be sold by Distributor at not less than Company's authorized prices therefor * * *

PETROLEUM PRODUCTS AND EQUIPMENT AGREEMENT:[9]

(The provisions of this form with respect to the dealer's purchases of petroleum products are identical with those in the Dealer Agreement, *supra* (Fdg. 13, R. 175).

DEALER AGREEMENT TBA (Fdg. 15, R. 178):[10]

(The Dealer Agreement TBA requires the dealer to buy from Standard all its requirements of petroleum products, defined as "those brands of such products generally sold by [Standard] to its dealers" (Fdg. 14, R. 176).)

Company [i. e., Standard] agrees to sell or consign to Dealer and Dealer agrees to purchase or receive from Company, and stock and offer for sale, all Dealer's requirements of tires, tubes, and batteries used or sold or bought to be used or sold by Dealer on said premises. The tires, tubes and batteries to be supplied Dealer hereunder shall be those lines supplied by Company from time to time to its dealers generally. Company will deliver to Dealer such other merchandise currently sold by Company that Dealer wishes to handle hereunder, in quantities necessary in opinion

[9] Appellants have 912 agreements in the form of its Petroleum Products and Equipment Agreement (Fdg. 16, R. 178). The form of agreement came into use in 1944 (Fdg. 9, R. 171).

[10] Appellants have 2,221 agreements with dealers in the form of their Dealer Agreement TBA (Fdg. 16, R. 178). This form came into use about 1944 and has gradually replaced and superseded the Distributor Agreement form (Fdg. 9, R. 171). Additionally, the language of the form with respect to automotive accessories differs only slightly from that contained in the Distributor Agreement.

of Company to meet Dealer's requirements at said premises. Whether tires, tubes, batteries and other non-petroleum merchandise which Dealer handles hereunder shall be consigned or sold to Dealer shall depend on Company's current policies but Company will allow Dealer the commissions, or the equivalent thereof in differentials below Company's selling price therefor, as set forth in the attached Schedule 'A'. Company may modify this schedule from time to time. All tires, tubes, and batteries sold or consigned to Dealer hereunder shall be sold by Dealer at not less than Company's authorized retail prices therefor * * *

SUBLEASE AGREEMENT (Fdg. 15, R. 178):[11]

Lessee shall handle and sell on the leased premises only such petroleum products as are sold lessee by lessor and agrees not to store, handle, sell or distribute on or from said premises any petroleum products of any description other than those petroleum products sold to lessee by lessor (Fdg. 15, R. 178).

In addition to the 7,145 written agreements appellants have oral agreements with 742 independent dealers pursuant to which the dealer agreed to handle and sell only appellants' gasoline (Fdg. 17, R. 179). Appellants also entered into various other oral agreements, the number of which is unknown, with some of the dealers with whom they

[11] Appellants have 1,800 Sublease Agreements with dealers. 1,798 of these are used in conjunction with other forms of agreement (Fdg. 16, R. 178; Gov't Ex. 5, R. 1311).

had executed "Dealer Agreements TBA" and "Distributor Agreements." Such oral agreements provide that the dealer will acquire from appellants, so long as they are able to furnish them, such automotive accessories, other than tires, tubes, and batteries, as he might require for use or sale at the retail outlet operated by him. (Fdg. 18, R. 179).

Appellants "persuaded, induced and influenced" independent dealers to enter into the foregoing written and oral agreements by various means and methods. Among these means and methods were (a) lending money without interest or at less than current interest rates, (b) making gifts of money, (c) making loans portions of which were later forgiven, (d) buying equipment from the dealer and thereafter furnishing new equipment without charge or at less than cost. In many instances such action was taken by appellants for the purpose of displacing competitive products then being handled by the dealer or for the purpose of precluding the acquisition of the dealer's outlet by a competitor of appellants. (Fdg. 22, R. 181).[12]

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[12] Appellants' assignment of error (Assigned 3(h), R. 1869) to this finding is in flat contradiction of the admissions of their answer. The complaint charged (Complaint, Par. 33, R. 9) in almost the precise language of the finding that appellants used the methods set forth above to persuade, induce, and influence independent dealers to enter into agreements. Appellants' answer (Answer, Par. 24, R. 94) admitted that in certain cases they employed those methods and that they may have been one of the reasons why dealers entered into agreements. Appellants denied only that they had made gifts of money or forgiven portions of loans "save in rare instances," none subsequent to about May 1, 1946.

The district court found "the intent, purpose and effect of the exclusive supply provisions of the written and oral agreements . . . have been to prevent the 'independent dealer' operating under said agreements from handling any 'petroleum products,' tires, tubes, batteries and miscellaneous accessories other than those supplied or sponsored by [appellants]" (Fdg. 31, R. 185).

The appellants policed the market to enforce the agreements. Appellants' representatives looked through dealers' stations to find whether they were handling competitive products, threatened to replace dealers who handled competitive products, and in fact did so (R. 495-511, 559, 713-719, 722, 745-747, 758, 766, 775, 805-807, 811-812, 815-816).

Suppliers were actually deprived of sales and many which had made sales to specified stations before they entered into appellants' agreements could not sell them afterward (R. 301-302, 306-307, 309, 339-344, 346-353, 356-362, 388-390, 396-412, 469-474, 484-485, 518-544, 571-575, 583-589, 612-613, 620-624, 634-637, 657-661, 663-666, 669-670, 677-678, 685-691). The district court made several findings based on such evidence. It found specifically, that "numerous manufacturers and producers of 'petroleum products' and 'automotive accessories' located both inside and outside of the States of the 'Western area' other than those producers and manufacturers whose products are marketed by defendants, are prepared to and have attempted to sell their respective brands of 'petroleum prod-

lets', tires, tubes, batteries, and miscellaneous accessories to 'independent dealers' within the Western area who have entered into the written and oral agreements . . . ." (Fdg. 29, R. 184.) It likewise found that "in many instances direct sales representatives of manufacturers and producers have unsuccessfully attempted to sell 'independent dealers' who were and still are parties to the written or oral agreements" (Fdg. 29, R. 184). Finally it found that "the direct flow of interstate commerce has been effected by the written and oral agreements . . . by denying the manufacturers of competitive products the right to sell the 'independent dealers' at the retail outlets" (Fdg. 32, R. 185).

The agreements entered into by appellants have directly affected and unreasonably restrained the course of interstate commerce in petroleum products and automotive accessories (Fdg. 32, R. 185). The written and oral agreements contemplate the movement and distribution of goods in interstate commerce. There is a constant flow in interstate commerce of the products produced and distributed by appellants. (Fdg. 23, R. 181).

The petroleum products sold and distributed in the Western area by appellants comprise both bulk products and packaged goods. Appellants supply bulk products to dealers in the Western area by various transportation methods, including tank cars, tank trucks, barges, and tankers. In some instances appellants supply dealers by transporta-

tion directly from their refineries to the dealer's storage tanks. In most instances appellants transport their products to various bulk plants owned and operated by them throughout the Western area for distribution from such plants to the 23 distribution divisions into which they have divided the area. (Fdg. 26, R. 182).

Packaged oils and greases sold by appellants are packaged at its three refineries in California, or at packaging plants at Willbridge, Oregon and Point Wells, Washington. The packaged oils and greases are distributed by appellants directly from these points to the four distribution divisions into which they have divided the Western area. (Fdg. 27, R. 183).

Automotive accessories, purchased by appellants from various concerns located both within and without the Western area, are shipped by these manufacturers to eight accessory warehouses maintained by appellants. These eight warehouses are located, three in California, two in Washington, and one each in Arizona, Oregon and Utah. From these warehouses, appellants distribute the accessory products to the dealers at their retail outlets in the Western area. In all but two instances the accessory warehouses serve dealers in more than one State. (Fdg. 28, R. 183.)

*Holding Below and Relief Granted*

The court below concluded that appellants' written and oral agreements have had the necessary and

intended effect "of denying the independent dealers access to competitors' products and of locking out such dealers from the sources of products originating in interstate commerce" (Concl. 7, R. 187), and "of denying manufacturers and suppliers of petroleum and automotive accessories [13] competitive to those manufactured or sponsored by [appellants] access to a substantial number of potential outlets for their products in the seven states of the Western area" (Concl. 8, R. 187). It concluded also that "the number of outlets and the volume of business in petroleum products and automotive accessories foreclosed to competition by the [appellants'] written and oral agreements . . . . is substantial whether considered comparatively or not" (Concl. 9, R. 187).

The court's holding was that appellants' exclusive dealing contracts constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act (R. 130).

On appellants' motion to reconsider on the ground that the case was controlled by this Court's decision in *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (decided on the same day the district court's opinion was filed), the court filed a supplemental opinion analyzing that decision, and concluding that it was without application to this case (R. 159-167).

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[13] Gasoline and tires, tubes and batteries are included in these terms (Fdgs. 5C and D, R. 169-170. See *supra*, p. 6).

The district court granted the relief prayed for by the Government. It adjudged unlawful and void all provisions in the agreements, written and oral, between appellants and the dealers, which bound the dealers to buy all their requirements of petroleum products and automotive accessories from appellants. It enjoined appellants from enforcing such provisions in existing agreements, and from entering into further agreements whereby they sold petroleum products or automotive accessories to any dealer upon the condition that the dealer would not sell at his retail outlet products other than those sold or sponsored by appellants (R. 188-193).

## SUMMARY OF ARGUMENT

### I

Appellants' exclusive dealing contracts completely destroy the opportunity of other sellers of similar products to compete for the patronage of the dealer outlets contractually tied to appellants. In addition, they deprive those outlets of the opportunity to buy in a competitive market. The only issue is whether the restraint of trade effected by these contracts is unreasonable since they affect a substantial segment of the market. Agreements which fence off from competition a substantial segment of the market constitute in effect a compulsory boycott of competitors. Moreover, the purpose for which they were employed in this case is the same as in the boycott cases. Appellants

possess a power comparable to that present in *International Salt Co.* v. *United States*, 332 U. S. 392, and the effects of appellants' agreements have been far more substantial. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, does not reject the view that these agreements as here used are unreasonable because of the substantial commerce affected. On the contrary, since appellants' competitors were shut off from a large segment of the market the agreements in this case fall squarely within the test laid down in that case. Appellants' request for an extensive economic inquiry to establish the claim that the agreements are reasonable because they permit wider distribution at lower prices is itself unreasonable, disregards the effect on competitors and dealers, and was rejected in *Standard Oil Co.* v. *United States*, 221 U. S. 1. That some of appellants' competitors also use exclusive dealing contracts emphasizes the suppressive effect of such agreements on competitors who do not or cannot use them, and points up the unreasonableness of such contracts. In *Federal Trade Commission* v. *Staley Co.*, 324 U. S. 746, 753, this court termed an assertion that competitors' like actions established legality a "startling conclusion". And it is no defense to unfair competitive practices to say that rivals might protect their trade by adoption of equivalent practices. *Federal Trade Commission* v. *Winsted Co.*, 258 U. S. 483, 493.

## II

Exclusive dealing agreements are within the purview of Section 3 of the Clayton Act since in practical effect they are agreements not to purchase the goods of a competitor. *International Machines Co.* v. *United States;* 298 U. S. 131. Likewise within the purview of Section 3 are such agreements even where confined to all purchases at a particular outlet since they are within the literal language of the section, its purpose and policy.

Since the Clayton Act reaches in its incipiency conduct which violates the Sherman Act, proof of violation of the latter Act by exclusive dealing contracts establishes a violation of the Clayton Act. Even if no violation of the Sherman Act were established, the facts here nevertheless establish a violation of Section 3 of the Clayton Act. In addition, in one of their affirmative defenses appellants stated they would be excluded from the market if they were forbidden to use exclusive dealing contracts while their competitors were permitted to do so. If the largest distributor in the industry would be so affected, the consequences of these agreements upon those who do not or cannot use them are clear. A further consequence is to induce other competitors also to utilize exclusive dealing contracts, thus further foreclosing the market. This admission and other facts which have been established sufficiently demonstrate that the effect of the agreements may be substantially

to lessen competition or tend to create a monopoly. Section 3 of the Clayton Act requires no more.

### III

The judgment should not except from its operation contracts made between the appellants and dealers located in California. The court has jurisdiction to enjoin local acts which restrain the free flow of interstate commerce into the State of California. The practice covered by the exemption granted in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, was not one which restrained interstate commerce. In any event, it is doubtful if the Court would today grant such an exemption. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683.

## ARGUMENT

Both the appellants and the Government agree that the court below held that the exclusive dealing contracts entered into by the appellants with approximately 6,000 independent dealers throughout the Western area constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act because those restraints affect a substantial segment of interstate commerce.

This was the theory of the Government's case in the court below. Because this theory was sometimes advanced in the form of a contention that these restrictions were *per se* violative of the Sherman and Clayton Acts, some misunderstanding

arose in the mind of the trial judge as to the exact nature of the Government's theory. The trial court's impression apparently was that the Government urged that these contracts in and of themselves, irrespective of the extent of their effect on interstate commerce, were in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act. Because the trial judge had this impression there are portions of his opinion which echo the views expressed by him throughout the trial rejecting this theory which he attributed to the Government. But the Government intended to advance no such theory and we agree with the appellants that the basic question in this case is whether, as the District Court held, these practices restrain substantial segments of interstate commerce and are therefore unreasonable and in violation of the sections of the Acts in question.

We start then, as do the appellants, with the trial judge's ruling that the appellants' exclusive dealing contracts which affect the distribution of gasoline, petroleum products and automotive accessories are violations of the Sherman and Clayton Acts because they unreasonably restrain a substantial part of the interstate commerce in this field.

We urge in Point I of this argument that the restrictive practices here involved so affect such a substantial segment of interstate commerce that they violate Section 1 of the Sherman Act. We

proceed in Point II to show that these restrictive practices, affecting commerce as they do, were violative of Section 3 of the Clayton Act. In Point III we show that no part of the judgment was beyond the jurisdiction of the court.

## I

**Foreclosure of Competition From a Substantial Segment of the Market by Exclusive Dealing Contracts Constitutes an Unreasonable Restraint of Trade Prohibited by Section I of the Sherman Act**

The approximately 8,000 agreements, written and oral, obligating approximately 6,000 independent retail outlets to purchase and stock for resale to the consuming public only the products of the appellants, completely destroy the opportunity of other sellers of similar products to compete for the patronage of those outlets. In addition, they deprive those outlets of the right to buy, and to derive the benefits that flow from buying, in a competitive market. Clearly, therefore, they completely suppress competition to the detriment of both the competing suppliers and the captive outlets. The only issue is the extremely narrow one of whether such a series of exclusive dealing contracts "unreasonably" restrains trade, as that term has been used since *Standard Oil Co. v. United States*, 221 U. S. 1.

"* * * the interest of the consumer is not all that determines the 'reasonableness' of the contract 'in restraint of trade.' It is also unlawful to

exclude from the market any of those who supply it * * * and it is no excuse for doing so that their exclusion will result in benefits to consumers or to the producers who remain" (*Fashion Originator's Guild* v. *Federal Trade Commission*, 114 F. (2d) 80, 85 (C. A. 2), affirmed 312 U. S. 457). A fundamental purpose of the Sherman Act is to prohibit "contracts" which "probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage in trade and commerce—in a word to preserve the right of freedom to trade" (*United States* v. *Colgate & Co.*, 250 U. S. 300, 307). Freedom to trade includes unrestricted access to the market. What does it avail a trader to have for sale a better gasoline, a better battery, or a better mousetrap if access to the market is denied to him! What protection is there for a buyer if he is denied the advantages of purchasing in a market in which unfettered competition exists! Recognizing this, the Court said, in *United States* v. *Yellow Cab*, 332 U. S. 218, 226, that the Act "is designed to sweep away all appreciable obstructions [in the channels of interstate trade] so that the statutory policy of free trade might be effectively achieved."

Agreements which fence off a substantial segment of the market from competing suppliers and which deny the fenced-in outlets the opportunity to trade with fenced-out suppliers directly impinge upon the right of freedom to trade and are,

therefore, in their very nature, in derogation of the concept of free competition in an open market.

Where, as here, there are thousands of such agreements they constitute a restraint similar in character to boycotts—which have been declared unreasonable without any inquiry as to injury or power to injure. *Eastern States Retail Lumber Dealers' Assn.* v. *United States,* 234 U. S. 600; *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457. By precluding the captive outlets from patronizing competing suppliers, appellants' agreements accomplish a compulsory boycott. The boycotting nature of these agreements becomes more apparent both as their number increases and as other competitors resort to similar measures. In this manner, retail outlets are progressively closed to all remaining competitors, particularly those who will not or cannot adopt such tactics. The effect from the point of view of these competitors is no different from that which would follow if the closed outlets were to agree among themselves to deal only with a few large suppliers.

Appellants give short shrift to the boycott cases on the ground that the intent in those cases differs from the intent in the present case. But the difference is not so great as to warrant such cavalier treatment. The district court found as a fact that the "intent, purpose and effect" of the exclusive supply provisions of appellants' agreements were to prevent independent dealers from handling

products other than those offered for sale by appellants (R. 185). The independent dealers were "persuaded, induced, and influenced" to enter into the agreements by financial gifts or concessions from appellants. Appellants in many instances took such action for the express purpose of displacing competitive products handled by the independent dealer or of precluding the acquisition of the dealer's outlet by a competitor of appellants. (R. 181.) Appellants' extension of these agreements over a substantial segment of the available retail outlets with such intent (R. 185) has the necessary consequence of injuring competitors. Since appellants must be presumed to have intended the necessary and foreseeable consequences of their acts (*United States* v. *Griffith Amusement Co.*, 334 U. S. 100, 104), the specific intent characteristic of boycott cases is present here.

The present case is also closely analogous to *International Salt Co.* v. *United States*, 332 U. S. 392. There the Salt Company leased 900 patented salt dispensing machines on the condition that the lessee purchase from the lessor its supply of salt for use in the machines. The annual purchases of such salt amounted to approximately $500,000. There was no showing of the percentage of the market which this amount represented. The Court stated that "it is unreasonable *per se* to foreclose competitors from any substantial market" (p. 396), and held that the Salt Company

was not entitled to introduce evidence to show "whether the restraint was unreasonable within the Sherman Act, or substantially lessened competition, or tended to create a monopoly in salt within the Clayton Act" (p. 396).

Appellants distinguish the *Salt* case on the ground that the Salt Company possessed monopoly power by virtue of its ownership of patents and this power was used as a leverage over the salt market. The present case is not substantially different. In the *Salt* case, since competing salt dispensing machines were available (*Morton Salt Co.* v. *Suppiger,* 314 U. S. 488), leverage over the market was not absolute. While appellants do not have absolute monopoly power, nevertheless, they do control the largest segment of the market, 23%, which, when considered in the light of the fact that the remaining 77% is shared by at least 80 other suppliers, necessarily gives them an economic power which tends toward monopoly power.[14] The trial court found that appellants "have persuaded, induced, and influenced" independent dealers to enter into exclusive dealing contracts by various means, such as "(a) lending money without interest or at rates below current interest rates; (b) by making loans, portions of which were later forgiven; (c) by making gifts of money; (d) by buy-

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[14] Appellants supply 23% of the gasoline sold in the Western area (R. 182). The next 6 largest companies supply some 40% (at App. Br. 20, R. 122). The balance is supplied by the remaining competitors, 70 of whom have an annual volume of over 1,000,000 gallons (App. Br. 20, 21).

ing equipment from the independent dealer and thereafter furnishing new equipment to said dealer without charge, or by (e) selling equipment to said dealer at less than cost" (R. 181). In addition, appellants admit that their "capital investment in the land and equipment of dealer stations is approximately $16,500,000" (Br. 10, fn. 11). They also admit that in many cases they install certain equipment for these dealers such as pumps, tanks, air compressors, air and water wells, hoists, buildings, canopies, rest rooms, lubricating oil equipment, drinking fountains, special lighting, painting and signs (Br. 9). These facts directly relating to the challenged agreements amply demonstrate the scope of appellants' power.

The difference in the source of the power, be it patent power, buying power, economic power, or otherwise, is immaterial. In *United States* v. *Griffith*, 334 U. S. 100, it was held that exhibitors of motion pictures, with theatres in 85 towns, in 53 of which there were no competing theatres, had violated the Sherman Act in negotiating contracts for film exhibition which restricted the competitive opportunities of other theatre owners. In reaching this conclusion the Court quoted the language of the *Salt* case, that it was unreasonable to foreclose competitors from any substantial market, and added that "the antitrust laws are as much violated by the prevention of competition as by its destruction" (p. 107). It also stated that large-scale buying could not "be used to stifle competi-

tion by denying competitors less favorably situated access to the market" (p. 108). We think the *Griffith* case, as well as the *Salt* case, makes it clear that it is the existence of power and not the manner in which it is gained that is the crucial factor.

Even apart from the larger number of exclusive dealing contracts, and the larger dollar volume of trade here than in the *Salt* case, and the percentage of the industry, here involved, appellants' agreements have had a substantially more severe impact upon competing suppliers and retailers than the exclusive dealing provisions in that case. The Salt Company had never refused to lease its machines in instances where the lessee objected to the tying clause. *United States v. International Salt Co.*, 6 F. R. D. 302, 306. Here, appellants will not do business except upon their own terms. They will not sell their gasoline, tires, tubes, batteries or accessories to any independent retailer unless he will agree to deal exclusively in appellants' gasoline.[15] In the *Salt* case, the lessor did not enforce the exclusive dealing provision (332 U. S. 392). In the present case the exclusive dealing provisions were policed and enforced (*supra*, p. 16). The leases in the *Salt* case permitted the lessee to purchase salt from other suppliers if

[15] Appellants' policy forbids sales of gasoline to an independent dealer who handles other brands of gasoline (R. 1127). Furthermore, appellants will not sell automotive accessories to a dealer who does not handle its gasoline (*Idem.*). Appellants will not sell tires, tubes and batteries to a dealer unless the dealer will sign a Dealer Agreement TBA (R. 1075).

the prices of such other suppliers were lower than the prices of the Salt Company (332 U. S. 396-397). There is no comparable provision in appellants' agreements. There, the Salt Company endeavored to pre-empt a segment of the market only in respect of sales of salt, a product which it produced. Appellants' practices are more extensive. Appellants produce only petroleum products, but, using them as leverage, appellants foreclose the market in a wide line of non-petroleum products—tires, tubes, batteries, and other types of goods which they themselves do not even manufacture, but buy from various manufacturing concerns and which have in common only that they are produced for consumption in conjunction with automotive vehicles. Appellants thus move into and foreclose a market in products which they themselves do not produce. The foothold which their production of gasoline, greases, and oils affords them is exploited by their exclusive dealing arrangements to restrain trade in automotive accessories generally.

The similarity between the boycott cases and the *Salt* case and the case at bar impels the conclusion that the restraint in this case constitutes at least as substantial and detrimental an obstruction to commerce as existed in those cases. There, as this Court pointed out in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, the restraints were held unreasonable without reference to the quan-

tum of commerce involved. We do not have to go so far as to contend that a similar rule should apply in the present case. However, we submit that in view of the character of appellants' restraint, proof of an effect upon a substantial segment of commerce is sufficient to render the restraint unreasonable without any further showing.

The recent decision in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, is not inconsistent with our view of the law. There the Government sought to enjoin as violative of both Sections 1 and 2 of the Sherman Act the acquisition by the United States Steel Company of the assets of Consolidated Steel Corporation, an independent fabricator of steel on the West Coast. The Government contended that the acquisition would exclude competitors from a substantial segment of the market represented by Consolidated's purchases of rolled steel products. In rejecting this argument, the majority of the Court determined that Consolidated had accounted for only 5 million dollars, or three percent of the annual demand for rolled steel products within the area of its operations (p. 527), and therefore concluded that the foreclosure of the market was unsubstantial. The approach of the majority of this Court made clear that its examination of the facts was directed to a determination as to the substantiality of the restricted competition, and that it was only upon this basis that it concluded there was no "unreasonable restraint of trade." There is nothing in

the opinion to suggest that, had a substantial segment of the market been foreclosed, the majority of the Court would nevertheless have found it necessary to conduct further inquiry into the "reasonableness" of the restraint. The acquisition would not have been justifiable on the ground that it would be advantageous to United States Steel, or that the public would be benefited and lower prices result (*Infra*, p. 36). Had a substantial segment of the market been foreclosed, the conclusion would have followed, in the light of existing precedents, that such a foreclosure was unreasonable and beyond justification.

The basis upon which the majority distinguished the *Yellow Cab* case illustrates the correctness of this view. In *Yellow Cab*, the complaint charged a *combination and conspiracy* to restrain trade with the *intent and purpose* of monopolizing the cab business in certain cities and, on a motion to dismiss, this allegation was accepted as true. On this ground, the majority opinion in *Columbia Steel* remarked that in the *Yellow Cab* case the amount of commerce was immaterial, and, of course, it followed from this fact that "Nothing in the *Yellow Cab* case supports the theory that all exclusive dealing arrangements are illegal *per se*" (p. 523).[15a] We do not contend otherwise.

The *Columbia Steel* case said, in substance, that

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[15a] This statement simply echoes the holding in *Pick Mfg. Co.* v. *General Motors Co.*, 299 U. S. 3, to which the court below referred (R. 106), that an exclusive dealing contract is not illegal *per se*.

the legality of the acquisition of Consolidated was to be determined by whether the "effect of such control is to unreasonably restrict the opportunity of competitors to market their products" (p. 524). We think it an ineluctable conclusion that the obstructions to commerce in this case must necessarily unreasonably restrict the opportunity of appellants' competitors, and especially the smaller competitors who among them supply only 37 per cent of the gasoline in the Western area (R. 122, 182, at App. Br. 20).[16] These agreements particularly affect the smaller competitors because appellants' major competitors have also fenced off retail outlets as private preserves of their own. Markets are not limitless and any substantial foreclosure therefrom obviously has serious consequences on a vendor's ability to market. That this is so would appear as patent an economic fact as the proposition "that the competitive opportunities of certain merchants were injured when they had to pay * * * substantially more for their goods than their competitors had to pay," a proposition which this Court described as "obvious" in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46. To require the extensive economic inquiry requested by appellants in order to establish such an elemental economic proposition as that for which we contend would seem senseless, and accomplish nothing but the erection of a useless

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[16] This figure ignores the industrial sales of appellants' six major competitors which the record fails to disclose.

and wasteful impediment to the effective enforcement of the antitrust laws. As this Court said in the *Morton Salt* case "It would greatly handicap effective enforcement of the Act to require testimony to show what we believe to be self evident * * *" (p. 50).

There is nothing in the *Columbia Steel* case which requires the consideration in this case of the additional and highly speculative economic inquiry appellants demand. The purpose of this additional inquiry, reduced to its lowest common denominator, is to determine whether the exclusive outlet is the most economical method of distributing gasoline to the public. It is plain that this line of argument is without avail, and does not establish the "reasonableness" of any trade restraint. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 48, in first enunciating the "rule of reason," held irrelevant arguments that the alleged restraints had in fact produced a wide distribution of products at prices below that which would have otherwise prevailed. The Sherman Act provided that competition should be the law of trade, and the Act is not to be judicially repealed by asserting that competition is economically wasteful, and that trade-restraining practices produce economic benefits. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 221; *United States* v. *Union Pacific R. Co.* 226 U. S. 61, 88. We find nothing in the *Columbia Steel* case which suggests that this long established rule has been changed.

The appellants introduced testimony which they contend demonstrates the reasonableness of their exclusive dealing contracts but which actually lends weight to the Government's position. This evidence was introduced for the purpose of showing that their major competitors employed exclusive dealing contracts, the theory being that the widespread nature of these practices suggests their reasonableness. To support factually this line of argument, appellants introduced the testimony of officials of their six largest competitors.[17] Through the testimony of these witnesses, appellants elicited that their respective companies each sold petroleum products and automotive accessories in most or all of the seven Western States, and that each entered into leases and agreements with independent dealers containing explicit provisions or affirmatively contemplating that the dealers should sell only the products of the single oil company.[18]

The theory that trade practices, otherwise illegal, may be validated by pointing to the fact that

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[17] The competitors, and their officials who appeared, are: Tide Water Associated Oil Company (McCall, R. 825); Shell Oil Co., Inc. (Hugill, R. 863); General Petroleum Corporation (Christy, R. 871); The Texas Company (Wharton, R. 876); Union Oil Company of California (Seeley, R. 879; Rogers, R. 884); and Richfield Oil Corporation (Will, R. 885).

[18] Appellants concede in their brief that "the dealer contracts and sublease arrangements of Standard's principal competitors are in general similar to those of Standard." (Br. 23). These leases and agreements were introduced as Appellants Exs. E and F (Tide Water Associated Oil Company, R. 1518, 1524); H and I (Shell Oil Co., Inc., R. 1538, 1554); K and L

competitors also engage in them was considered a "startling conclusion" by this Court in *Federal Trade Commission* v. *Staley Co.*, 324 U. S. 746, 753. There, it was held that a seller may not justify his use of a basing-point system of pricing, otherwise illegal under the Clayton Act, by showing that other competitors are violating the law by maintaining like systems. Monopolizing practices cannot be justified on the ground that a business rival is a "vicious monopoly" which can only be fought by resort to similar practices. *United States Tel. Co.* v. *Central Union Tel. Co.*, 202 Fed. 66, 74-75 (C. A. 6), certiorari denied, 229 U. S. 620; see, also, *Farmers Livestock Commission Co.* v. *United States*, 54 F. 2d 375, 379 (E. D. Ill.).

Nor is it true that all competitors of appellants pursue similar exclusive dealing practices. There are many independent sellers of petroleum products and automotive accessories which do not resort to such arrangements.[19] Similarly, it is no

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(General Petroleum Corporation, R. 1569, 1578); N and O (The Texas Company, R. 1590, 1603; Q and R (Union Oil Company of California, R. 1611, 1615); and U Richfield Oil Corporation, R. 1621).

[19] e.g., The MacMillan Petroleum Corporation endeavors to sell its oils and greases to all types of resale accounts (R. 314). Appellants' Ex. II (R. 1675) lists 79 companies which sold over 1,000,000 taxable gallons of gasoline in the Western area in 1946, and their Ex. GGG (R. 1864) listed 69 sellers of their own brand of lubricating oil. There is no proof that any of these sellers insists on exclusive outlets. Appellants Ex. FFF (R. 1863), showing the extent to which competitive automotive accessories are in fact surreptitiously sold at appellants' outlets, establishes that competitors are willing to sell on a nonexclusive basis.

answer to say that all competitors might resort to such practices. *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304, 312-313; *Federal Trade Commission* v. *Winsted Co.*, 258 U. S. 483, 493.

If the "reasonableness" of a trade restraint could be established by the widespread nature of its use, anomalous results would ensue. Trade restraints, otherwise illegal, would be validated if they had been so widely copied as to constitute a genuine menace to trade. A small group of powerful traders, each engaging in restraints of trade, might validate their practices by each pointing to those of the others—figuratively, all lifting one another by the bootstraps.

The officials of appellants' six largest competitors, who were called as witnesses by appellants, in the main furnished: (1) figures disclosing the respective numbers of independent dealers with whom each had exclusive-dealing arrangements during each of the years 1937 to 1946, inclusive; and (2) figures disclosing the gallonage or dollar value of various petroleum products and automotive accessories sold by each at retail during the years 1937 to 1946, inclusive.[20]

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[20] The request, in the form of a questionnaire, sent to each of the six competitors is Appellants' Ex. B (R. 1515). The responses of the six were introduced as appellants' Exs. C (Tide Water Associated Oil Company, R. 1516), G (Shell Oil Co., Inc., R. 1534), J (General Petroleum Corporation, R. 1566), M (The Texas Company, R. 1589), P and S (Union Oil Company of California, R. 1609, 1618A, and T (Richfield Oil Corporation, R. 1619).

Presumably, these compilations of figures were designed to show that each of the six leading rivals of appellants had not suffered competitively over the ten-year period; that this was demonstrable by the fact that each had about as many exclusive outlets, relative to those of appellants, in 1946 as in 1937; and that each had increased gallonage or dollar volume of their products during the period.

We fail to see how any showing as to the maintenance of the competitive position of the six leading competitors of appellants, each of whom admittedly pursues the same restrictive practices as appellants do, establishes the reasonableness of such practices. The purpose of the antitrust laws is not to preserve the positions of powerful competitors all of whom engage in similar trade restrictions. Disastrous effects to trade are to be anticipated from an acceptance of any claim by appellants that their exclusive dealing arrangements are "reasonable" because powerful competitors follow the same practices. For, though there are undoubtedly a small number of economically powerful petroleum producers which, like appellants, seek exclusive outlets, it is also true that there are many producers of the variety of petroleum products and automotive accessories in which appellants are interested who lack the ability to obtain their own exclusive outlets. The competition of the many would soon be lost if appellants' practices should be considered legal solely because a few other powerful

rivals also pursue them. The existence of similar restraints by powerful competitors does not establish reasonableness. In *United States* v. *Paramount Famous Lasky Corp.*, 282 U. S. 30, a contract in use by more than half the industry was held unreasonably in restraint of trade, and the fact that it was evolved after six years of discussion and experimentation was deemed to have no bearing on its "reasonableness."

## II

**Foreclosure of Competition From a Substantial Segment of the Market by Exclusive Dealing Contracts Constitutes a Substantial Lessening of Competition and a Tendency to Monopoly Prohibited by Section 3 of the Clayton Act**

Section 3 of the Clayton Act makes it unlawful for any person to sell or contract to sell goods on condition that the purchaser shall not use or deal in the goods of a competitor of the seller where the effect of such sale or contract of sale or such condition "may be to substantially lessen competition or tend to create a monopoly." The court below found that appellants' agreements came within and were in violation of this Section. It found that appellants had entered into agreements for the sale of petroleum products and automotive accessories upon condition that the purchaser not deal in the goods of a competitor (R. 185), and concluded that their effect was to "substantially lessen competition and tend to create a monopoly in the sale and

distribution of petroleum products and automotive accessories" (R. 186). Appellants challenge both the conclusion that the agreements are within the purview of Section 3 and the conclusion that they have the prohibited effect.

Appellants contend that their contracts do not come within the purview of Section 3 of the Clayton Act because the independent dealer agrees only to buy from them "all his requirements" (Br. 82-85). That an agreement requiring a purchaser to purchase his entire requirements from a vendor is an agreement that the purchaser shall not deal in the goods of a competitor was firmly settled in *International Machines Corp.* v. *United States,* 298 U. S. 131. That corporation leased its machines on condition that the lessee use therein only cards purchased from it. In meeting an argument similar to that here made, this Court said (p. 135):

> Little need be said of the contention that the condition of appellant's leases does not infringe these prohibitions. It is true that the condition is not in so many words against the use of the cards of a competitor, but is affirmative in form, that the lessee shall use only appellant's cards in the leased machines. But as the lessee can make no use of the cards except with the leased machines, and the specified use of appellant's cards precludes the use of the cards of any competitor, the condition operates in the manner forbidden by the statute.

The same rule was enunciated in *International Salt Co.* v. *United States,* 332 U. S. 392, and *United*

*Shoe Machinery Co.* v. *United States,* 258 U. S. 451.[21]

Appellants further contend that their exclusive dealing agreements do not come within the purview of Section 3 of the Clayton Act because the agreements are confined in terms to the particular outlet for which the dealer contracts to purchase. These agreements are within the literal language of the section as agreements "that the * * * purchaser * * * shall not * * * deal * * * in the goods * * * of a competitor or competitors of the * * * seller." Appellants point to nothing in the purpose or policy of the Act which would require that the language be given other than a literal interpretation, but rely upon *Federal Trade Commission* v. *Sinclair,* 261 U. S. 463. There this Court set aside the Commission's order which required the Sinclair Company to cease from its practice of leasing to retail dealers underground tanks and pumps at nominal prices upon condition that the equipment should be used only in conjunction with gasoline supplied by Sinclair. The holding that the tying agreements did not come within the letter of the Clayton Act is distinguishable because there the agreements not to buy the goods of a competitor

[21] Lower court cases which have rejected the argument appellants here make are: *Radio Corporation* v. *Lord,* 28 F. (2) 257 (C. A. 3), certiorari denied, 278 U. S. 648; *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission,* 150 F. (2d) 952 (C. A. 1), certiorari denied, 326 U. S. 776; *Signode Steel Strapping Co.* v. *Federal Trade Commission,* 132 F. (2d) 48 (C. A. 4).

were limited to goods for use in a single pump and did not either in terms or practical effect apply to the entire outlet. As the Court said in *United States* v. *Bausch & Lomb Co.,* 321 U. S. 707, 722, the agreements in the *Sinclair* case simply "restricted use of a distributor's gasoline tanks." While the Commission found in the *Sinclair* case, as appellants point out (Br. 83), that the practical effect of the tying contracts was to close the outlets to competitors, the Court specifically rejected that conclusion (pp. 473-474). In this case it is admitted that the intended effect was to close the entire outlet. In any event, this phase of the *Sinclair* decision appears inconsistent with the more recent decisions of this Court in the *International Salt* and *International Machines* cases, *supra,* where the conditions in the leases of machines were that the lessee would use in connection with them only the supplies of the lessor. The lessees were free to lease competing machines for use side by side at the same location and to purchase identical supplies for use in them from other suppliers.[22]

Appellants finally contend that the exclusive dealing contracts are not in violation of Section 3 because it was not shown that their effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Since the

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[22] There were available competing machines in both the *International Machines* case (298 U. S. at p. 132), and in the *International Salt* case. See *Morton Salt Co.* v. *Suppiger Co.,* 314 U. S. 488.

Clayton Act was intended to curb in their incipiency agreements within the sphere of the Sherman Act (*Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356); it follows that proof of a violation of the Sherman Act proves a violation of the Clayton Act (*International Salt Co.* v. *United States, supra*).

Even assuming, *arguendo*, that a violation of Section 1 of the Sherman Act has not been established, it is nevertheless clear that appellants' agreements are in violation of the Clayton Act. That Act does not in terms require that the vendor possess a monopoly power to use as a lever before the contracts may be condemned and no such requirement has been read into it. *Standard Fashion Co.* v. *Magrane-Houston Co., supra.* Nor does the Act or decided cases support the proposition (App. Br. 93) that the prohibited effect can be established only by proof that competitors have been driven out of business, that their size or power has declined, or that the number of their customers or their volume of business has progressively declined. The condemned effect may be shown by other evidence. *International Salt Co.* v. *United States*, 332 U. S. 392. The Government's proof in this case, as we have shown, conclusively demonstrates a very substantial lessening of competition. However, it is not necessary that the evidence show any more than that the effect of appellants' contracts "may" be to substantially lessen competi-

tion. Here appellants admit that such is their effect. One of their affirmative defenses involved the claim that appellants would be excluded from the market if they were forbidden to use exclusive dealing contracts while their competitors were permitted to do so (R. 96). That appellants, the largest distributor in the industry, would be so affected dramatically demonstrates the position of appellants' smaller competitors who do not now use them. The consequence of their use by one competitor, therefore, is to compel others to utilize them with the result of further foreclosing the market to the prejudice of those who do not or cannot use exclusive dealing contracts *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. (2d) 48 (C. A. 4). In the *Signode Steel* case, one of twelve manufacturers of strapping machines leased its machines upon the condition that the lessee not use in the machine any supplies not purchased from the company. The company's principal competitors followed the same practice. In discussing the effect of the company's practice on competition the court said (p. 54):

> * * * And as pointed out by the Commission, the effect of the trade practice of the company is materially increased by reason of the fact that it forms a part of the cumulative effect of the practices of the three leading companies in the tying machine industry, all three of whom were subject to orders by the Commission.

Appellants' admission of the obvious effect of its exclusive dealing contracts confirms the view of the trial court that "we are dealing not with probabilities but with actualities" (R. 165) and serves as a complete answer to appellants' defense that these contracts have been in use for a long time and have not had the prohibited effect. Its admission further demonstrates that there can be no free competition in the Western area until appellants and their competitors have released their captive markets.

*Federal Trade Commission* v. *Sinclair,* 261 U. S. 463, is not to the contrary. There, the holding was that the tying agreements were not within the purview of the Clayton Act and were not an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act because "the record does not show that the probable effect of the practice will be unduly to lessen competition" (p. 475). This conclusion was based in part upon the fact that dealers were not only free to enter into similar arrangements for the same location with competing suppliers, but were also free to purchase and install their own tanks and pumps "by investing a comparatively small sum" (p. 474). The Court said "the devices are not expensive—$300 to $500—can be purchased readily of makers and, *while convenient, they are not essential*" [Italics supplied] (p. 475). The opinion would indicate that the Court was keenly aware

of the fact that if it sustained the order and permitted an independent dealer to serve the public through a Sinclair pump a brand of gasoline other than Sinclair, it would in effect be cooperating in the perpetration of a fraud upon the public. There is, of course, no similar problem here—sustaining the judgment does not authorize the perpetration of a fraud. It is one thing to permit an agreement that the gasoline pump may not be used to dispense the gasoline of another company and quite another to claim that an entire outlet must be confined to a single brand in order to prevent consumer deception.

## III

### The Judgment Properly Enjoins Appellants' Exclusive Dealing Contracts With Their California Dealers

Appellants' contention that the court should have exempted from the operation of the judgment their exclusive dealing contracts with dealers located in California requires little comment. It has long been settled that local acts which have the effect of restraining interstate commerce may be enjoined. *Loewe* v. *Lawlor*, 208 U. S. 274; *Local 167* v. *United States*, 291 U. S. 293; *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *Mandeville Farms* v. *Crystal Sugar Co.*, 334 U. S. 219. The closing of retail outlets in the State of California to out-of-State vendors clearly affects interstate commerce by restraining the flow of goods into the State which but for the agreements would

ordinarily compete for the trade of such outlets. In this connection the district court specifically found "that numerous manufacturers and producers of 'petroleum products' and 'automotive accessories' located both inside and outside of the States of the 'Western area', other than those producers and manufacturers whose products are marketed by defendants, are prepared to and have attempted to sell their respective brands of 'petroleum products', tires, tubes, batteries and miscellaneous accessories to 'independent dealers' within the Western area who have entered into the written or oral agreements * * *" (Fdg. 29, R. 184). It likewise found that "in many instances direct sales representatives of manufacturers and producers have unsuccessfully attempted to sell 'independent dealers' who were and still are parties to the written or oral agreements." (Fdg. 29, R. 184). Finally it found that "the direct flow of interstate commerce has been effected by the written and oral agreements . . . by denying the manufacturers of competitive products the right to sell the 'independent dealers' at the 'retail outlets.'" (Fdg. 32, R. 185).

*Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, upon which appellants rely, is not in point. There the Court exempted local price-fixing combinations from the operation of the judgment. The exempted combinations did not restrain interstate commerce because producers

located without the State could nevertheless ship their goods into the State for sale in competition with the producers who were parties to the local price-fixing combinations. Moreover, it is doubtful if such an exemption would be granted today. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be affirmed.

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